No. 87-1276

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

H-CHH ASSOCIATES, doing business as PLAZA PASADENA, and HAHN PROPERTY MANAGEMENT CORPORATION,

Petitioners,

vs.

CITIZENS FOR REPRESENTATIVE GOVERNMENT, doing business as PASADENA CITIZENS FOR REPRESENTATIVE GOVERNMENT, DALE L. GRONEMEIER, CHRISTOPHER A. SUTTON, and OZRO ANDERSON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND DISTRICT, DIVISION ONE

THOMAS J. LEANSE
Counsel of Record

JERALYN B. KELLER
CHERYL A. INGRAM
PEPPER, HAMILTON & SCHEETZ

444 South Flower Street, 19th Floor
Los Angeles, California 90017
(213) 688-5600

Counsel for Petitioners
H-CHH ASSOCIATES doing business as
PLAZA PASADENA and HAHN
PROPERTY MANAGEMENT CORPORATION

Publishing and Graphic Electronic Services, Inc. (PAGES) / (213) 474-7855

QUESTION PRESENTED

In *Robins v. PruneYard Shopping Center*, 23 Cal.3d 899, 153 Cal.Rptr. 854, 592 P.2d 341 (1979), *aff'd sub nom. PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), the California Supreme Court ruled that individuals could exercise certain rights protected by the California Constitution at privately owned shopping centers subject to rules reasonably adopted to assure that the constitutionally permitted activities do not interfere with normal business operations. In this case of first impression, the California Court of Appeal imposed the same "least restrictive means" standard of review applied to regulations enacted by governmental entities to the time, place and manner rules adopted by Petitioners in regulating activity on its private property.

The question presented is:

"Whether application of the 'least restrictive means' standard to time, place and manner rules promulgated in good faith by the management of a privately-owned shopping center results in a taking without just compensation in violation of the private property owners' rights under the Fifth and Fourteenth Amendments?"

LIST OF PARTIES AND RULE 28.1 LIST

Petitioners H-CHH Associates, doing business as Plaza Pasadena, and Hahn Property Management Corporation were plaintiffs, cross-defendants, respondents, and cross-appellants below. Petitioner H-CHH Associates is a California limited partnership with Ernest W. Hahn, Inc. and Pasadena Mall, Inc. as general partners, and Ernest W. Hahn, Inc. as a limited partner. Petitioner Hahn Property Management Corporation is a wholly owned subsidiary of Ernest W. Hahn, Inc.

Respondents Citizens for Representative Government, Dale L. Gronemeier, Christopher A. Sutton and Ozro Anderson were defendants, cross-complainants, appellants and cross-respondents below.

Ernest W. Hahn, Inc., Patti K. Maude, City of Pasadena, Pasadena Redevelopment Agency and Pasadena Community Development Commission were also named as cross-defendants below.

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TO THE CALIFORNIA COURT OF APPEAL,
SECOND DISTRICT, DIVISION ONE

Petitioners H-CHH Associates and Hahn Property Management Corporation respectfully pray that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Second District, Division One, entered in the above-entitled proceeding on July 28, 1987.

OPINIONS BELOW

The opinion of the California Court of Appeal, Second District, Division One is reported at 193 Cal.App.3d 1193, 238 Cal.Rptr. 841, and is reprinted

in the appendix hereto, pp. A1-A46, *infra*. The order of the California Court of Appeal denying the petition for rehearing has not been reported and is reprinted in the appendix hereto, p. B1, *infra*. The order of the California Supreme Court denying review after judgment by the Court of Appeal has not been reported, and is reprinted in the appendix hereto, p. C1, *infra*.

The temporary restraining order and the preliminary injunction entered by the Superior Court of California for the County of Los Angeles (Hon. Jack T. Ryburn and Hon. Warren H. Deering presiding, respectively) are reprinted in the appendix hereto, pp. D1-D6 and pp. E1-E4, *infra*.

JURISDICTION

Petitioners commenced this action in the Superior Court of California, for the County of Los Angeles, seeking injunctive and declaratory relief. Respondents filed a cross-complaint seeking injunctive relief and damages. On December 23, 1985, Judge Ryburn issued Petitioners' requested temporary restraining order. On January 10, 1986, Judge Deering issued a preliminary injunction which was substantially the same as the earlier temporary restraining order.

Respondents appealed from the entry of injunctive relief and Petitioners cross-appealed. On appeal, Petitioners argued that property rights guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution supported the lower court's enforcement of the time, place and manner rules adopted by Petitioners in response to *Robins v.*

PruneYard Shopping Center, 23 Cal.3d 899, 592 P.2d 341, 153 Cal.Rptr. 854 (1979).

On July 28, 1987, the California Court of Appeal reversed the trial court's entry of the preliminary injunction and affirmed the entry of the temporary restraining order. On August 27, 1987, the Court of Appeal summarily denied Petitioners' request for rehearing. On October 29, 1987, the California Supreme Court denied Petitioners' Petition for Review.

The jurisdiction of this Court to review the judgment of the California Court of Appeal is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V, which provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, which provides:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law;

California Constitution, Article One, Section Two, which provides:

> Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of his right. A

> law may not restrain or abridge liberty of speech or press.

California Constitution, Article One, Section Three, which provides:

> The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

STATEMENT OF THE CASE

Petitioners H-CHH Associates and Hahn Property Management Corporation (collectively referred to as the "Shopping Center") own and manage a shopping center in Pasadena, California known as "Plaza Pasadena." The Shopping Center, surrounded by public sidewalks, contains approximately 600,000 square feet of retail space, and accommodates approximately 125 commercial tenants. The two-story structure is constructed in airspace, purchased by Petitioner H-CHH Associates over an underground parking garage owned by the City of Pasadena and leased to the Shopping Center and other businesses. The Shopping Center is located in downtown Pasadena, immediately adjacent to the Pasadena Civic Auditorium and is one block from City Hall.

On December 19, 1985, respondent Dale L. Gronemeier, a member and representative of Respondent Citizens for Representative Government ("CRG") contacted Patti K. Maude, the manager of the Shopping Center. He stated that CRG wanted to use the Shopping Center to distribute leaflets and solicit petition signatures. Maude supplied him with a

registration form and a copy of the Shopping Center's "Rules of Political Petitioning on Shopping Center Property" (*See H-CHH Associates v. Citizens for Representative Government*, 193 Cal.App.3d 1193, 1226, 238 Cal.Rptr. 841, 862 (1987)) and explained that the Shopping Center did not allow political activity during the holiday season. Despite this policy, Gronemeier informed Maude that CRG intended to solicit signatures at the Shopping Center on Monday, December 23, 1985.

Like those of many other California shopping centers, the Shopping Center's "Rules for Political Petitioning on Shopping Center Property" were drafted with the admonitions of *Robins v. PruneYard Shopping Center*, 23 Cal.3d 899, 592 P.2d 341, 153 Cal.Rptr. 854 (1979) in mind. The rules apply to all persons engaging in political activity within the Shopping Center and make no distinction based on the content or subject matter of the proposed communication. The rules and policies adopted by the Shopping Center merely regulate the time, place, and manner of the activity, so as to minimize disruption of business within the Shopping Center. The written rules set out general guidelines applicable to all properties managed by Petitioner Hahn Property Management Company in California. The policies of the Shopping Center are more specifically tailored to the individual shopping center and are based on the professional judgment and experience of the Shopping Center's manager in reducing customer inconvenience.

On December 23, 1985, anticipating that the proposed activity would disrupt the holiday shoppers, the Shopping Center filed a verified complaint for

injunctive and declaratory relief to prevent CRG's threatened and unauthorized activity. The Shopping Center sought and obtained a temporary restraining order requiring respondents to comply fully with the Shopping Center's rules and regulations regarding political activity. CRG filed a cross-complaint to enjoin the Shopping Center from enforcing its rules and for damages but were not granted any temporary relief.

Thereafter, CRG applied to the Shopping Center for permission to collect signatures on political petitions on January 2, 1986. Permission was granted on the condition that CRG comply with the Shopping Center's rules and regulations.

On January 10, 1986, Judge Deering issued a preliminary injunction which required compliance with most of the rules enforced by the temporary restraining order.[1]

CRG appealed from the entry of the temporary restraining order and the preliminary injunction, arguing that the restraining order and injunction, to the extent they enforced the Shopping Center's rules and policies, impermissibly restricted CRG's California constitutional rights. The Shopping Center cross-appealed, arguing that those portions of its rules which were not enforced were reasonable and necessary to protect its Fifth Amendment property

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[1] The trial court granted Respondents the right to "approach" patrons of the shopping center and also allowed Respondents the right to solicit money from the patrons of the shopping center. Neither activity had been permitted by the Plaza Pasadena rules or the temporary restraining order.

rights and that those rules and policies which were enforced were reasonably designed to protect its property rights and the property rights of its tenants.

The California Court of Appeal ruled that the trial court erred "to a significant extent" in issuing the preliminary injunction. *H-CHH Associates*, 193 Cal.App.3d at 1206, 238 Cal.Rptr. at 848. After tracing the evolution of California's free speech doctrine from *Diamond v. Bland*, 3 Cal.3d 653, 477 P.2d 733, 91 Cal.Rptr. 501 (1970) (*Diamond I*) to *Robins v. PruneYard Shopping Center*, 23 Cal.3d 899, 592 P.2d 341, 153 Cal.Rptr. 854 (1979), the Court of Appeal emphasized that:

> [p]roperty rights must be "redefined in response to a swelling demand that ownership be responsible and responsive to the needs of the social whole. Property rights cannot be used as a shibboleth to cloak conduct which adversely affects the health, the safety, the morals or the welfare of others."

H-CHH Associates, 193 Cal.App.3d at 1206, 238 Cal.Rptr. at 849 (citing *Robins*, 23 Cal.3d at 906-07, 153 Cal.Rptr. at 852).

The Court of Appeal then stated that restrictions on speech, though justified by the existence of "countervailing substantial or compelling interests," must be "narrowly drawn". *H-CHH Associates*, 193 Cal.App.3d at 1207, 238 Cal.Rptr. at 850. The Court of Appeal further noted that, in this case, the shopping center owner's only "rights of substance" are "freedom from disruption of normal business operations and freedom from interference with customer

convenience". *H-CHH Associates*, 193 Cal.App.3d at 1208, 238 Cal.Rptr. at 850.

To preserve these rights, the court applied a strict reasonableness standard, citing *Spiritual Psychic Science Church v. City of Azusa*, 39 Cal.3d 501, 516, 703 P.2d 1119, 1127-28, 217 Cal.Rptr. 225, 233 (1985), which employed the "least restrictive means" analysis articulated in *United States v. O'Brien*, 391 U.S. 367 (1968). By adopting this standard, the Court of Appeal tacitly rejected *PruneYard*'s ruling that a shopping center owner may "restrict expressive activity by adopting time, place and manner regulations that will *minimize any interference with its commercial functions*." *PruneYard*, 447 U.S. at 83 (emphasis added).

The Court of Appeal applied what it called "the traditional analysis of time, place and manner regulations" in this case because it viewed the Shopping Center as a "joint participant" in a public enterprise, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), rather than a privately owned "quasi-public" forum like those in *In re Hoffman*, 67 Cal.2d 845, 434 P.2d 353, 62 Cal.Rptr. 97 (1967), *Diamond I, supra*, 11 Cal.3d 331, and *Robins, supra*, 23 Cal.3d 899.[2] *H-CHH Associates*, 193 Cal.App.3d at 1208, 238 Cal.Rptr. at 851. The Court of Appeal decided that the Shopping Center was more akin to public property than private property because the Shopping Center is

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[2] The premises in *Hoffman* was a privately owned railway station and the premises in *Diamond I, supra* and *Robins, supra* were privately owned shopping centers. In each of those cases the courts were dealing with prohibition of permissible activity rather than regulation of permissible activity.

constructed over a publicly owned garage on publicly owned land despite the trial court's factual determination that the Shopping Center is indeed private property.[3] *H-CHH Associates*, 193 Cal.App.3d at 1209, 238 Cal.Rptr. at 851.

The Court of Appeal then applied the "least restrictive means" standard to the challenged rules and policies.

For example, the Court determined that the standard which the Shopping Center management used to determine whether or not a group would be allowed to utilize the Shopping Center was unconstitutionally broad, conferring excessive discretion in the Shopping Center management. The rule permitted the Shopping Center management to reject any activity which, in their opinion, would "adversely affect the shopping center environment, atmosphere or image." *H-CHH Associates*, 193 Cal.App.3d at 1211, 238 Cal.Rptr. at 852.

The Court of Appeal viewed many of the Shopping Center's rules and policies as general and subjective and articulated "objective" standards for screening applications. *H-CHH Associates*, 193 Cal.App.3d at 1212, 238 Cal.Rptr. at 853.

The Court also found the Shopping Center's policy of designating the Shopping Center's largest courtyard area, Garfield Court, as the site for political activity unconstitutional under either of two interpretations of the policy. First, if the rule was construed to mean that only Garfield Court would be designated, regardless of

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[3] *See H-CHH Associates*, 193 Cal.App.3d at 1228, 238 Cal.Rptr. at 865.

alternatives within the Shopping Center's common area, then the policy was defective because "[a] regulating authority may not adopt rules which preclude the exercise of free expression in an appropriate place, even on the ground another place is available." *H-CHH Associates*, 193 Cal.App.3d at 1213, 238 Cal.Rptr. at 853. If the policy was read to express a mere preference for Garfield Court, it was also constitutionally defective because it conferred "unbounded discretion" on the Shopping Center management to select an alternative site if Garfield Court is unavailable. *Id.*

The Court further stated that a constitutional rule could take into account the effects of special activities and displays in the Plaza, such as those at the Shopping Center in December, 1985: a large Christmas tree, a place for Santa Claus to sit, an automobile raffle, a gingerbread house display and auction, booths for giftwrapping, mailing and gift certificates, a toy collection facility, and various storybook displays.

The Court reached similar conclusions regarding the remaining rules it found to be unconstitutional. Typically, the Court's criticisms and proffered substitutions focused on any aspect of the Shopping Center's rules which permitted the Shopping Center management and marketing staff to exercise their professional judgment in assessing the impact of the desired activity on the commercial functions of the Shopping Center.[4]

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[4] For example: Rule 10 prohibits use of musical or sound equipment in a manner which "in the reasonable belief of the central management office, may be disturbing or offensive."

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Because it determined that a majority of the Shopping Center's policies were unconstitutional, the Court of Appeal ruled that the trial court's entry of the preliminary injunction was erroneous. *H-CHH Associates*, 193 Cal.App.3d at 1219, 238 Cal.Rptr. at 858. In view of increased pedestrian traffic and special activities and displays at the Shopping Center during the holiday period, the Court of Appeal affirmed the entry of the temporary restraining order, but cautioned that the holiday ban on speech activity should be expressed in a written rule which specified the effective dates.

Dissenting Justice Hanson took issue with the standard of review applied by the majority. He first observed that in federal cases, " [t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.' " *H-CHH Associates.*, 193 Cal.App.3d at 1223-1224, 238 Cal.Rptr. at 861 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983)). He concluded that the standard of review applied by the majority was inappropriate, since the restrictions at issue governed use of private, not public land, and were

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CHH Associates, 193 Cal.App.3d at 1217, 238 Cal.Rptr. at 856. The Court found that this rule vested unconstitutional discretion in the Shopping Center management.

Rule 13, which permits Plaza Pasadena management to decide whether "the measure of the proposed political petitioning activity creates a risk of injury or damage to personal property, and . . . [whether] such a risk warrants special insurance protection," was also found to be unconstitutionally arbitrary. *H-CHH Associates*, 193 Cal.App.3d at 1218-1219, 238 Cal.Rptr. at 857.

not an "ordinance or statute but 'rules' obviously prepared, in good faith with *PruneYard* in mind, by property owners who operate a mall for commercial purposes." *H-CHH Associates.*, 193 Cal.App.3d at 1225, 238 Cal.Rptr. at 861.

REASONS FOR GRANTING THE WRIT

By applying the same standard of review to time, place and manner restrictions utilized by private property owners to regulate speech on private property as is applied to governmental restrictions controlling speech activity on public property, the California Court of Appeal wholly discounted the federally guaranteed property rights of the Shopping Center. Whatever virtues of simplicity or convenience favor the application of the single standard to all situations, private or public, the application of a single standard so significantly dilutes the Fifth and Fourteenth Amendment protections of private property as to render them meaningless. Review by this Court is necessary to remedy this injustice and to prevent further erosion of the protection of the Fifth Amendment, for "[w]hen this seemingly absolute protection is found to be qualified . . . , the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.).

Also, this Court's rulings in such cases as *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), and *Nollan v. California Coastal Commission*, 107 S.Ct. 3141 (1987), cast serious doubt on the continuing validity of

PruneYard. Thus, both the doctrine and its appliction require review by this Court.

A. There Is No Constitutional Basis For Imposing A Least Restrictive Means Test To Evaluate Time Place And Manner Rules And Policies Of A Privately Owned And Managed Shopping Center.

In *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980), this Court ruled that the California Supreme Court's ruling in *Robins v. PruneYard Shopping Center* did not violate federally guaranteed property rights, because the shopping center was free to "restrict expressive activity by adopting time, place, and manner regulations that will minimize any interference with its commercial functions." *PruneYard*, 447 U.S. at 83. Thus, the owner's private property rights were not infringed by the California Supreme Court's grant of access rights to members of the public at the expense of the private property owner because the private property owner could regulate the access.

However, the Shopping Center loses its ability to protect its economic interests when it loses the ability to minimize the impact of political activities upon its particular business. Application of the same strict "least restrictive means" standard of review to the Shopping Center's rules as is applied to governmental restrictions is, therefore, inappropriate, and, insofar as it violates this court's ruling in *PruneYard*, unconstitutional.[5]

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[5] This is supported by the Court's recent decision in *Hazelwood*

Plaza Pasadena is not unique. Many similar shopping centers and malls, owned and operated by private entities for commercial, not altruistic, purposes, must delineate standards by which to "minimize any interference with . . . commercial functions." *See PruneYard*, 447 U.S. at 83. Application of the "least restrictive means" test to policies adopted by shopping center owners to regulate political activity within the centers instead minimizes the ability of the private property owner to exercise any control over what political activity will be conducted on his property and to reduce its impact.

This level of stringent review is normally used in analyzing statutes and ordinances relating to First Amendment activities enacted by governmental entities, *see, e.g., Alternatives for California Women, Inc. v. County of Contra Costa*, 145 Cal.App.3d 436, 193 Cal.Rptr. 384 (1983) (county ordinance prohibited door-to-door solicitation between 7 p.m. and 8 a.m.). In such situations, application of the "least restrictive means" standard of review to time, place and manner regulations is appropriate for at least two reasons.

School District v. Cathy Kuhlmeier, ___U.S.___, 88 Daily Journal D.A.R. 564 (January 13, 1988)) where the Court expressly rejected a suggestion that the school officials' control of the student newspaper be limited by written regulations or objective standards. *Hazelwood* ___U.S.___, 88 Daily Journal D.A.R. 564 n. 6. The Court, in explaining the standard to be applied to the student newspaper, stated that unless facilities are opened "for the indiscriminate use by the general public" then reasonable restrictions on First Amendment rights are permitted. The Court specifically overruled the Eighth Circuit's holding that regulations were limited to those 'necessary to avoid material and substantial inference.' "

First, given the breadth of governmental authority and the strength which the government is able to bring to bear against the individual, unless speech restrictions are narrowly tailored to meet a significant government interest, a very real possibility for complete censorship exists. *See Hudgens v. NLRB*, 424 U.S. 507, 541-42 (1976) (Marshall, J., dissenting). In contrast to the pervasive influence of governmental free speech restriction, even a complete prohibition of political speech activity in a shopping center would not effectively foreclose all lively discourse.[6]

Secondly, the "least restrictive means" standard may be appropriately applied in the context of regulations promulgated by government because it is not necessary to preserve the constitutional rights of the governmental entity. Government is entitled to make use of the police power for the common good, but there are no governmental rights which must be recognized and preserved in striking a balance between the public's free speech rights and the government's interest in the exercise of that power. Thus, requiring the government to make an affirmative showing that its interest is substantial and cannot be achieved by alternative, less drastic means merely resolves conflicts between individual speech rights and a scheme which ultimately

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[6] Even if all political activity were excluded from the Plaza Pasadena premises, that ban would not prevent discourse in other truly public areas. This contrasts sharply with the company town situation discussed in *Marsh v. Alabama*, 326 U.S. 501 (1946), which differs both "structurally and functionally" from a shopping center. *See Shad Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 506 n. 7, 488 N.E.2d 1211, 1217 n. 7, 498 N.Y.S. 2d 99, 105 n. 7 (1985).

exists for and inures to the public good. *See Alderwood Assocs. v. Washington Envioronmental Council*, 96 Wash. 2d 230, 635 P.2d 108, 120 (1981) ("[T]he police power of the state is an attribute of its sovereignty, an essential element of the power to govern. The power exists without declaration, and the only limitation upon it is that it must reasonably tend to promote some interest of the state, and not violate any constitutional mandate.")

An accommodation between the rights of individuals, on one hand, and private property rights of other individuals on the other hand necessarily gives rise to different concerns.[7] No longer is it the goal to minimize the government's ability to restrict debate and to maximize exercise of free speech rights. Instead, federal protection of property rights requires that an accommodation between speech and property rights be reached which preserves the rights of each individual, particularly where there has been no showing that the property owner has engaged in content-based discrimination. Application of a least restrictive means test in this context elevates the speech rights of one individual over the property rights of another by requiring the property owner to make a significant showing in support of his efforts to protect those rights. Although a state is free to elevate certain rights above others under the state constitution, *see generally* Brennan, *State Constitutions and the Protection of Individual*

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[7] This is similar to the "[a]ccommodation between employees' § 7 rights and employers' property rights," which "must be obtained with as little destruction of one as is consistent with the maintenance of the other." *National Labor Relations Board v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

Rights, 90 Harv. L. Rev. 489 (1977); Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C.L. Rev. 353 (1984), *a state may not do so by compromising federally protected rights. See H-CHH Associates*, 193 Cal.App.3d 1222, 238 Cal.Rptr. at 860 (Hanson, J., dissenting) ("So long as a state respects the federal constitutional minimum, it may define the maximum scope of constitutional rights.")

The particular nature of the facility at issue here, although given relatively minor consideration below, and indeed, by the *Robins* and *PruneYard* courts, must be a factor in developing a formula for balancing speech and property rights which compromises neither. *See Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 650-51 (1981) ("[c]onsideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest must be assessed in light of the characteristic nature and function of the particular forum involved.").[8]

Even cases dealing with publicly owned property recognize that the "dedicated use" must be considered in evaluating the appropriateness of a particular restriction. Government may impose the least restric-

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[8] No one would realistically contend that CRG or any one has the right to go into either the Broadway Department store or the J.C. Penney store at the Shopping Center and approach people with a petition or solicit money from them. The expectation is equally applicable to the other tenants of the Shopping Center. Why then should the manager of the Mall be restricted like the Mayor of the City or the Police Chief in limiting the activities of people who want to use the facilities without paying rent?

tions on places like streets and parks.[9] Other property which the state has opened for speech activity is subject to somewhat greater regulation by using reasonable time, place and manner restrictions. *Perry Education Association*, 460 U.S. at 46.

Where public property has not by tradition or designation been a forum for public communication, a governmental entity may regulate by use of reasonable time, place and manner rules. The State may

> reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view. . . . " [T]he State, *no less than a private owner of property*, has power to preserve the property under its control for the use to which it is lawfully dedicated."

Perry Education Association, 460 U.S. at 46 (emphasis added) (citing *United States Postal Service v. Council of Greenburgh Civic Association*, 453 U.S. 114, 129-130 (1981)). In *International Society for Krishna Consciousness, Inc. v. New Jersey Sports & Exposition Authority*,

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[9] Streets and parks have traditionally been used for public debate, and "[i]n these quintessential public forums, the government may not prohibit all communicative activity" unless it can "show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. . . . The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Education Association*, 460 U.S. at 45.

691 F.2d 155 (3d Cir. 1982), the Third Circuit discussed the "critical" distinction between public forums and publicly owned facilities which are so dedicated to particular uses that they are not designated as public forums:

> First Amendment activity in a public forum may be restricted only by reasonable time, place or manner regulations that serve a significant governmental interest and leave open ample alternative channels for communication. . . . Governmental restrictions on a non-public forum are not evaluated by this standard. . . .

International Society for Krishna Consciousness, 691 F.2d at 160 (citations omitted); *see also Lehman v. City of Shaker Heights*, 418 U.S. 298, 312 (1974) (" . . . there are some places which are so clearly committed to other purposes that their use as public forums for communication is anomalous.")

Thus, publicly owned facilities which have been dedicated to a particular use do not become public forums simply because they are used for the communication of ideas. Otherwise, "display cases in public hospitals, libraries, office buildings, military compounds, and other public facilities, immediately would become Hyde Parks open to every would-be pamphleteer and politician. This the Constitution does not require." *Perry Education Association*, 460 U.S. at 49 n. 9. *See also Hazelwood School District*, ___U.S___, 88 Daily Journal D.A.R. 564 (January 13, 1988).

Like a hospital, library, or office building, Plaza Pasadena is dedicated to a particular use. As a commercial enterprise, it is intended to produce a

profit for its owners while providing a service — convenient shopping — to its patrons. Also, Plaza Pasadena is contractually obligated to its tenants to maximize the profitability of the facility, and, to fulfill this obligation, must create an atmosphere which allows easy, convenient and pleasant shopping for consumers.

Plaza Pasadena is privately owned rather than publicly owned. Rules governing conduct on private property dedicated to a particular use (in this case, commercial), should be judged by a less stringent standard than governmentally enacted statutes and ordinances — not a more stringent standard.

B. To Impose The Least Restrictive Means Test When Scrutinizing The Time, Place And Manner Rules Of A Privately Owned And Managed Shopping Center Constitutes A Taking Without Due Process And Just Compensation.

Decisions allowing access to privately owned shopping centers for political speech impose significant administrative and economic burdens on owners of facilities like the Shopping Center.[10] To the extent the

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[10] First, the application and registration procedure, as set out by the Court of Appeal below, requires the Shopping Center management to consider numerous factors in determining whether the particular application poses any particular problems which must be accommodated, whether that particular application poses any danger of conflict or confrontation with another group which is scheduled at the mall, and whether the signs or visual aids to be employed are unsuitable for use in the shopping center. Even after

Court of Appeal's ruling requires that the Shopping Center accommodate more than one group at any particular time, that burden is multiplied.

Courts ruling on these issues have continually discounted the simple fact that owners of centers such as the Shopping Center are engaged in business. That this business creates a facility which the public may use to shop with ease and convenience does transform it into a public forum for speech purposes. Resources of the Shopping Center which are diverted to accommodating political activities on the premises necessarily interfere with the Shopping Center's commercial effectiveness.

Thus, although *PruneYard* held that the California Supreme Court's decision in *Robins* did not effect a taking without just compensation in violation of the Fifth and Fourteenth Amendments, that is precisely what has occurred in subsequent applications of *Robins*. It is well established that:

> a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine.

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the group has gained access to the mall, management has a continuing obligation to monitor the activity of the group to determine that the type or size of the activity has not obstructed the flow of pedestrian traffic or resulted in congestion, to assure that any musical instrument or sound reproduction device is not impinging on the hearing and peace of the general public, to foreclose abuse of the facility by the group once access has been gained and to be certain that shopping center patrons are not being harassed or accosted.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432 (1982). *PruneYard* allows the State of California to require privately owned shopping centers to accept and accommodate political activity on a permanent and ongoing basis.[11] Application of the least restrictive means standard increases the already substantial economic burden imposed upon the Shopping Center. Rules such as those recommended by the California Court of Appeal permit a physical intrusion — either intermittent or continuous — which is more permanent than temporary, and imposes a significant burden on resources which might profitably be directed toward the Shopping Center's primary concern — its commercial and financial well being. *PruneYard* and its progeny require an owner of private property, who earns a living by providing a convenient, practical shopping resource to the public, to provide and maintain a safe, effective forum for public discourse as well. Imposition of this duty "forces [the Shopping Center] alone to bear public burdens", a service for which it should be compensated. *See PruneYard*, 447 U.S. at 82-83 (citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Recent decisions of this Court suggest that the *PruneYard* doctrine should be reevaluated. In *Loretto*, this Court ruled that the relatively minor physical

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[11] "[T]he 'right to exclude,' so universally held to be a fundamental element of the property right, falls within . . . [the] category of interests that the Government cannot take without compensation. . . . And even if the Government physically invades only an easement in property, it must nonetheless pay just compensation." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (footnote omitted).

intrusion effected by the permanent installation of cable television equipment on the exterior of a privately owned building was a taking for which the government must give just compensation. *See Loretto*, 458 U.S. at 441. In so holding, the Court reaffirmed that where governmental action results in "permanent physical occupation of property, . . . [the] cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *See Loretto*, 458 U.S. at 434-35. *PruneYard* was distinguished on the basis that the physical invasion there was not permanent. *See Loretto*, 458 U.S. at 434.

The physical invasion suffered by the Shopping Center as a result of the *PruneYard* decision imposed an economic burden as serious as that in *Loretto*.[12] The economic impact alone is sufficient to constitute a taking, but is not determinative.

The crucial, and frequently dispositive distinction drawn between the physical invasion permitted by *PruneYard* and the physical intrusion in cases where this Court has found takings is that the *PruneYard* invasion has been categorized as temporary rather than permanent. Indeed, the intrusion by any particular group *is* temporary. But to characterize the requirement that a shopping center make its facilities available

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[12] As stated previously, the Shopping Center's management must spend a significant amount of time reviewing each application and actively monitoring speech activity in the Shopping Center. Additionally, political speech activity in the Shopping Center has a certain, but perhaps unquantifiable negative effect on sales at Plaza Pasadena. *See Lehman* 418 U.S. at 304.

to individuals and political groups on a "least restrictive means" basis as temporary rather than permanent misperceives the nature of the imposition.

In fact, granting access to the Shopping Center's facility subject only to the least restrictive means of regulation gives individuals and groups who want to engage in political activity on the Shopping Center's property an easement for that purpose, similar to the easement which this Court found was a taking in *Nollan v. California Coastal Commission*, ___U.S___, 107 S.Ct. 3141 (1987). In *Nollan*, the California Coastal Commission conditioned the granting of a building permit on acceptance of a public easement across the Nollan's beach-front property. This Court stated that a "permanent physical occupation" has occurred "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *See Nollan*, ___U.S___, 107 S.Ct. at 3145.

Despite the inconsistency between *Nollan* and *PruneYard*, Justice Scalia distinguished *PruneYard*, stating that the access in *PruneYard* was not permanent, and the owner had already opened his property to the public. *Nollan*, ___U.S___, 107 S.Ct. 3145, n. 1. This distinction over-simplifies the true nature of the *PruneYard*-sanctioned intrusions on private property as well as the nature of the invitation which is extended by the shopping center to the public. An invitation to the public to stroll, window shop, and purchase goods is not tantamount to a general invitation to use the shopping center for all purposes.

See Lloyd Corp. v. Tanner, 407 U.S. 551, 564 (1972). A limited invitation to members of the public should not convert a privately-owned commercial enterprise into a public forum. As to public property, this Court has stated that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." *International Society for Krishna Consciousness, Inc.*, 691 F.2d at 159 (citing *Adderly v. Florida*, 385 U.S. 39, 48 (1966)).

Consideration of both the purpose to which the Shopping Center has been dedicated and the burdens imposed by *PruneYard* in this context mandates a reconsideration of *PruneYard* and its characterization of shopping centers as public forums. Clearly, a privately owned and managed shopping center like the Shopping Center has been dedicated to a particular purpose, which should be respected no less than the purpose of a hospital, library, or sports arena. It may be true that the modern shopping center is replacing shopping districts in many areas.[13] To equate a

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[13] "Both statistics and common experience show that business districts, particularly in small and medium sized towns, have suffered a marked decline. At the same time, shopping malls, replete with creature comforts, have boomed. These malls have begun to serve as social as well as commercial outlets for the communities they serve. . . . Members of the community have an opportunity by chance or design to mix, meet and converse. *However, these social benefits are ancillary to the commercial purpose of shopping malls and do not involve organized campaign on particular issues by political or special interest groups.* Law and sociology are not coextensive." *Western Pennsylvania Socialist Workers 1982 Campaign v. Connecticut General Life Insurance Company*, 512 Pa. 23, 33, 515 A.2d 1331, 1336 (1986) (emphasis added).

privately owned business venture with a city park for speech purposes, however, ignores the principles articulated in this Court's previous decisions based on a false distinction. Perpetuation of this false distinction will inevitably lead to strained and illogical results; indeed, it already has. Application of the "least restrictive means" standard to regulations adopted in a good faith effort to comply with *Robins* so effectively derogates the Shopping Center's prerogatives of ownership that a taking without just compensation in violation of the Fifth and Fourteenth Amendments is effected.

Absent reconsideration and guidance from this Court, commercial ventures such as the Shopping Center face the prospect of ongoing litigation on these issues, and the ultimate result that shopping centers will cease operation as commercial entities and become, instead, multipurpose exhibition halls operated by the state.

CONCLUSION

For these reasons, this petition for certiorari should be granted. The "least restrictive means" standard for evaluating rules does not comport with this Court's holding in *PruneYard* and must be clarified. Additionally, *PruneYard*, when considered along with this

Court's subsequent decisions, is an anamoly, and, as applied, effectuates an unconstitutional taking without justification.

Respectfully submitted,

THOMAS J. LEANSE
Counsel of Record

JERALYN B. KELLER
CHERYL A. INGRAM
PEPPER, HAMILTON & SCHEETZ
444 South Flower Street, 19th Floor
Los Angeles, California 90017
(213) 688-5600
Counsel for Petitioners

Dated: January 26, 1988

APPENDIX A

Opinion and Judgment of Court of Appeal

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE
COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

H-CHH ASSOCIATES, a California Limited Partnership, dba PLAZA PASADENA, and HAHN PROPERTY MANAGEMENT CORPORATION, a California Corporation,	)	2d Civ. No. B019051
	)	(Superior Ct. No. C580408)
Plaintiffs, Respondents and Cross-Appellants,	)	
v.	)	
CITIZENS FOR REPRESENTATIVE GOVERNMENT, an Unincorporated Association, dba PASADENA CITIZENS FOR REPRESENTATIVE GOVERNMENT, DALE L. GRONEMEIER,	)	

CHRISTOPHER A. SUTTON, and OZRO ANDERSON,	)
Defendants, Appellants and Cross-Respondents.	)

APPEAL from orders of the Superior Court of Los Angeles County. Jack T. Ryburn and Warren H. Deering, Judges. Reversed in part and affirmed in part.

Gronemeier, Barker & Huerta and Dale L. Gronemeier, Nicholas George Rodriguez, Brenda J. Penny, Christopher A. Sutton and Elbie J. Hickambottom, for Defendants, Appellants and Cross-Respondents.

Ball, Hunt, Hart, Brown and Baerwitz and Thomas J. Leanse and Charles M. Gale, for Plaintiffs, Respondents and Cross-Appellants.

Allen B. Grodsky, Robert B. Broadbelt, Antonette B. Codero, Gary Williams and Paul Hoffman, for Amicus Curiae American Civil Liberties Union of Southern California.

INTRODUCTION

Defendants Citizens for Representative Government and individual members thereof appeal from orders granting a temporary restraining order and a preliminary injunction to plaintiffs H-CHH Associates and Hahn Property Management Corporation. Plaintiffs cross-appeal from that portion of the order which invalidates their rules and regulations proscrib-

ing the solicitation of funds from or approaching plaintiffs' patrons.

STATEMENT OF FACTS

Plaintiffs own and operate privately an extensive shopping center in downtown Pasadena known as Plaza Pasadena. The two-story building complex contains approximately 600,000 square feet of rental space and caters to 125 commercial tenants. This area surrounds a central courtyard running the length of the mall interior. The area denominated "Garfield Court" is approximately 100 feet wide; the remainder of the courtyard is approximately 40 feet in width. The Plaza occupies several square blocks along the city's major thoroughfare and has replaced, for the most part, one of the city's major shopping districts. It is immediately adjacent to the Pasadena auditorium and convention center and within one block of City Hall. The city's redevelopment agency financed three underground parking garages extensively used by the Plaza and for which the Plaza pays rental fees. There is little access to the Plaza from public streets and the vast majority of Plaza patrons gain entrance through the city-owned parking garages. The land upon which the Plaza stands is city-owned, acquired through the exercise of its powers of condemnation.

On December 19, 1985, defendant Dale L. Gronemeier (Gronemeier), a member and representative of Citizens for Representative Government, approached Patricia K. Maude (Maude), the manager of Plaza Pasadena, expressing a desire to circulate leaflets and gather petition signatures on Plaza property. Maude supplied Gronemeier with a registration form developed by plaintiffs and a set of plaintiffs' written

"Rules of Political Petitioning on Shopping Center Property." She also advised him that Plaza Pasadena would not permit the solicitation of signatures during the Christmas season. Gronemeier nevertheless informed Maude that Citizens for Representative Government would appear to solicit signatures on Monday evening, December 23, 1985.

The preamble to plaintiffs' written rules defines "political petitioning" as "any conduct by which an individual obtains signatures for any petition directed to any governmental or political body. These rules shall not be deemed or construed to permit any activity other than political petitioning, and the owners of the center reserve the right to prohibit any activity other than that described in these Rules and sanctioned by law."

Rule 1 of plaintiff's written rules provides in pertinent part: "Prior to engaging in political petitioning, a petitioner must notify the center management office and provide it with the name, address, signature of a responsible adult who, by said signature, expressly accepts full liability for damage, costs or expenses resulting from the proposed activity. Said liability shall include, but is not limited to, maintenance costs for cleaning up litter and expenses resulting from damage to persons or property or both." Rule 2 states: "If leaflets or other material are to be handed out . . . , the petitioner must post a $50.00 security deposit to cover the cost of cleaning up litter which results from such activity. The deposit, less any expense incurred . . . , shall be refunded approximately two weeks after said activity has ended."

Rule 3 requires that "All petitioners engaged in political petitioning shall use only that portion of the

center property expressly designated for that purpose by the center management office." Rule 4 leaves the number of petitioners who may engage in political petitioning at a given time solely within the discretion of the management office. "This determination shall be based on the following factors: (1) the area available for such activities; (2) the number of petitioners who wish to engage in such activities at one particular time; (3) the potential for conflict between petitioners or between petitioners and members of the public; and (4) the safety of the public and center property." Similarly, Rule 5 leaves the time during which political petitioning may take place solely within the discretion of the management office and states that determination is to be based on the four factors enumerated in Rule 4.

Rule 6 provides: "Only that furniture . . . approved by the center management office shall be used on the center property for political petitioning. Said furniture shall be located as prescribed by the center management office." Rule 7 states: "Posters, plaqards [*sic*] and displays as well as their location and method of display shall be subject to the approval of the center management office. In no event shall such materials be affixed to any portion of the center property." Rule 9 prohibits the use of lights, loudspeakers or other electrical or mechanical equipment, while Rule 10 prohibits the use or operation of any musical instrument or sound reproduction device "in such a manner as to cause any sound or noise which, in the reasonable belief of the center management office, may be disturbing or offensive."

Rule 8 prohibits petitioners from making an "express or implied representation to any person within the

center or on center property that the owner or the manager of the center sponsors or supports any view, belief, or request contained in any petition, statement or literature being disseminated or exhibited on center property." Rule 11 prohibits the solicitation of "contributions or donations from anyone on center property," as well as "the sale of any items or services on said property." Rule 12 requires that petitioners "not impede or interfere with the business of any center tenants, employees or personnel, nor shall they approach, detain, or in any way impede or interfere with the smooth flow and free passage of center patrons, customers or personnel through the access ways of the center."

Rule 13 provides: "If in the good faith judgment of the center management office the measure of the proposed political petitioning activity creates a risk of injury or damage to person or property, and that such a risk warrants special insurance protection, then the petitioner planning to engage in such activity must purchase and carry the necessary insurance coverage. Said insurance policy shall name as additional insureds Hahn Property Management Corporation, the center owner and the center Merchants' Association and petitioner shall provide the center manager prior to commencement of political petitioning with a valid certificate of insurance evidencing the same." Finally, Rule 14 promulgates standards of general decorum.

In addition to the written rules, plaintiffs have adopted the following unwritten rules which govern political activity on Plaza Pasadena property. A party seeking the use of Plaza property for political activity must fill out the written registration form; thereafter, he or she will receive notification within 72 hours of

acceptance or rejection of the application. Apart from verifying that the activity involved is political rather than commercial, the management office is to have no concern with the subject matter of the activity. Generally, political activities are to be assigned to the Garfield Court area. No political activities will be authorized the day after Thanksgiving or during the latter part of December. The availability of the forum for the days requested must be confirmed; each applicant will be limited to two days unless no other request has been made for the third day and day-to-day thereafter. Political activities are to be manned by a maximum of two persons, and the Plaza will provide authorized display furniture only: a card table with table cloth and two chairs. The only articulated standard for denying an application is a determination that it will "adversely affect the shopping center environment, atmosphere, or image."

After consulting with Susan Roberts, director of marketing for Plaza Pasadena, Maude made a decision in the first week of December to prohibit political activity during the Christmas season. At that time, the Plaza accomodated a large Christmas tree, a Santa Claus display, an automobile raffle, a gingerbread house display and auction, booths for gift wrapping, mailing and gift certificates, a toy collection facility and various story book displays. In addition, Plaza traffic increased significantly at that time of the year, as evidenced by the increase in use of the parking structure during December 1984 from 214,051 automobiles to 344,500. Statistically, pedestrian traffic appears to increase approximately 70 percent during this period, with each visitor staying longer. However, direct observation at 6:00 p.m. on Friday, December

20, 1985, found traffic in the Plaza to be extremely light.

PROCEDURAL BACKGROUND

On December 23, 1985, plaintiffs sought injunctive and declaratory relief which would require that defendants comply in full with the Plaza's rules and regulations, written and unwritten, regarding political activity. They applied ex parte for a temporary restraining order, prior to a hearing on the propriety of a preliminary injunction, on the ground defendants had stated the intention of distributing leaflets and seeking signatures for political petitions in total disregard of the applicable rules and regulations. Defendants cross-complained, seeking to enjoin plaintiffs from enforcing those rules. The trial court immediately issued plaintiffs a temporary restraining order on the terms requested and set the matter of a preliminary injunction for hearing on January 10, 1986.

Thereafter, Citizens for Responsible Government applied to the Plaza Pasadena management for permission to collect signatures on political petitions on January 2, 1986; permission was granted only on condition defendants comply with all rules and regulations. After taking evidence, the court granted plaintiffs a preliminary injunction, finding all rules and regulations to be reasonable and valid as written, with the following exceptions: The definition of "political petitioning" must be expanded to include the distribution of written materials and the solicitation of funds; Rule 7 must be limited in application to approval of the size, number and location of posters, placards and displays; Rule 11 may not be applied to prevent the solicitation of contributions to support defendants'

political advocacies; and Rule 12 may not be utilized to prohibit the "approach" of Plaza patrons within a reasonable radius of the area designated for petitioning. The court also found plaintiffs' registration form and the requirements therein to be reasonable.

Defendants and "their agents, servants, and all persons acting in concert with any or all" of them were restrained from "engaging in any political activity on the premises of Plaza Pasadena . . . until said defendants have caused to be submitted to plaintiff an application or registration and have received approval by plaintiff for such activity"; and from "violating or failing to comply with the rules and regulations adopted by plaintiffs" with the exceptions delineated above. The instant appeals followed.

CONTENTIONS

On Appeal

I

Defendants contend the trial court erred in granting a preliminary injunction, in that plaintiffs' rules and regulations fall outside the spectrum of reasonable time, place and manner restrictions and, hence, impermissibly restrict defendants' exercise of their First Amendment rights.

II

Defendants further contend the trial court erred in issuing a temporary restraining order, in that the invocation of the plaintiffs' rules and regulations

impermissibly restricted defendants' exercise of their First Amendment rights.

On Cross-Appeal

III

Plaintiffs assert the trial court erred in invalidating Rules 11 and 12 insofar as they proscribe the solicitation of political funds or political petitioners' approach of Plaza patrons.

DISCUSSION

On Appeal

I

Defendants contend the trial court erred in granting a preliminary injunction, in that plaintiffs' rules and regulations fall outside the spectrum of reasonable time, place and manner restrictions and, hence, impermissibly restrict defendants' exercise of their First Amendment rights. We agree to a significant extent.

Section 2 of Article I of the California Constitution guarantees to the citizens of this state the rights of free speech and a free press. Our Supreme Court first addressed the applicability of these rights, if any, to privately owned shopping centers in *Diamond v. Bland* (1970) 3 Cal.3d 653 (*Diamond I*). In *Diamond I*, the court considered the nature and character of a privately-owned shopping center — a place which the public is openly and expressly invited to use at its pleasure — and concluded citizens had the right to

exercise rights of free speech and petitioning in that forum, notwithstanding its privately- owned character. The court emphasized the minimal impact on a shopping center owner's private property rights from permitting a small, orderly group to utilize that property as a forum. (At p. 665.)

Two years later, In *Lloyd Corp. v. Tanner* (1972) 407 U.S. 551, the United States Supreme Court held the invitation to public use of a shopping center was not a sufficient dedication of privately owned property to public use to entitle citizens to utilize it as a forum for the exercise of First Amendment rights. (At p. 570.) Accordingly, a privately-owned center could prohibit the distribution of printed material unless that material communicated information relating to the center's business — *provided* there existed adequate alternate means of communication. (*Ibid.*) Prompted by the decision in *Lloyd Corp.*, our Supreme Court reconsidered the issue in *Diamond v. Bland* (1974) 11 Cal.3d 331 (*Diamond II*) and concluded *Lloyd Corp.* required that *Diamond I* be overruled.

The matter next came before our Supreme Court in *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899. The court notes the express provision in the California Constitution guaranteeing "the right to . . . petition government for redress of grievances" (art. I, § 3), and explicates the importance of that right as "an essential attribute of governing." (23 Cal.3d at p. 907.) *Robins* continues, "the [state's] power to regulate property is not static; rather it is capable of expansion to meet new conditions of modern life. Property rights must be "redefined in response to a swelling demand that ownership be responsible and responsive to the needs of the social whole. Property rights cannot be

used as a shibboleth to cloak conduct which adversely affects the health, the safety, the morals, or the welfare of others." ' (At pp. 906- 907, quoting from *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 404.)

Robins analyzes in detail the burgeoning importance of the shopping center in society and in community development, concluding: "To protect free speech and petitioning is a goal that surely matches the protecting of health and safety, the environment, aesthetics, property values and other societal goals that have been held to justify reasonable restrictions on private property rights." (23 Cal.3d at p. 908.) The court then turns its attention to the scope of protection which the California Constitution affords the rights of free speech and press, finding that section 2 of article I provides 'more definitive and inclusive' guarantees than does the First Amendment to the Federal Constitution. (*Ibid.*, quoting from *Wilson v. Superior Court* (1975) 13 Cal.3d 652, 658.) Given the scope of that protection, the court holds, "the public interest in peaceful speech outweighs the desire of property owners for control over their property." (*Robins, supra,* at p. 909; see also *Schwartz- Torrance Investment Corp. v. Bakery & Confectionery Workers' Union* (1964) 61 Cal.2d 766, 768.)

In conclusion, *Robins* emphasizes: "By no means do we imply that those who wish to disseminate ideas have free rein. We noted above Chief Justice Traynor's endorsement [in *In re Hoffman* (1967) 67 Cal.2d 845] of time, place, and manner rules. (. . . at pp. 852-853.) Further, as Justice Mosk stated in Diamond II, 'It bears repeated emphasis that we do not have under consideration the property or privacy rights of an

individual homeowner or the proprietor of a modest retail establishment. . . . A handfull of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by [the property owner] to assure that these activities do not interfere with normal business operations (see *Diamond* [I] at p. 665) would not markedly dilute . . . property rights.' (11 Cal.3d at p. 345 (dis. opn. of Mosk, J.).)" (*Robins, supra*, at pp. 910-911.)

The exercise of rights of free expression may be restricted when it conflicts with the promotion of countervailing substantial or compelling interests. (*First National Bank of Boston v. Bellotti* (1978) 435 U.S. 765, 786.) However, even those restrictions justified in the protection of these interests must be narrowly drawn to that end. (*Ibid.*; *Alternatives for California Women, Inc. v. County of Contra Costa* (1983) 145 Cal.App.3d 436, 449.) To be reasonable, such regulations must be neither vague nor subjectively over- or underinclusive. (*Shad v. Mount Ephraim* (1981) 452 U.S. 61, 68-71; *Morris v. Municipal Court* (1982) 32 Cal.3d 553, 565.)

In essence, *Robins v. Pruneyard Shopping Center, supra*, 23 Cal.3d 899, in affirming a shopping center owner's right to impose reasonable time, place and manner restrictions on petitioning activity recognized in the owner important rights of substance; those rights are identified as freedom from disruption of normal business operations and freedom from interference with customer convenience. However, despite plaintiffs' characterization to the contrary, *Robins* did not establish a new standard of reasonableness to be applied to private property. *Robins* relied heavily on

Diamond I, supra, 3 Cal.3d 653 and *In re Hoffman, supra,* 67 Cal.2d 845, each of which addressed the use of privately owned property as a "quasi-public" forum. *Hoffman* is particularly instructive on the issue of what type of restriction is reasonable. The court first specifies that protected activity which is free from interference; that which does not interfere with the conduct of business or the use of the property, does not impede the movement of customers or business tenants, does not block access to facilities or businesses, is not noisy and creates no disturbance and does not entail the harassment of uninterested patrons. (*Id.*, at p. 851.) Moreover, *Hoffman* notes: "It is immaterial that another forum, equally effective, may have been available. . . . Absent the presence of some conflicting interest that could be protected in no other way, petitioners have the right to choose their own forum." (*Ibid.*, fn. 7.)

To be certain protected activity falls within the above category, "[c]ongestion can be avoided by controls on activities during peak hours. [Citations.] *Reasonable* and *objective* limitations can be placed on the number of persons who can be present . . . at the same time, and the persons present can be required so to place themselves as to limit disruption. [Citation.] In areas normally subject to congestion, . . . [protected] activities can be prohibited. [Citations.] Persons can be excluded entirely from areas where their presence would threaten personal danger or block the flow of . . . traffic, such as doorways and loading areas. [Citations.]" (*Id.*, at pp. 852-853.) It is clear that *Hoffman* requires time, place and manner regulations to be narrowly focused in the traditional manner; so, too, does *Robins.*

Neither can the rights sanctioned in *Robins* be equated with commercial speech rights. It is not the medium chosen, but the content of the message which distinguishes commercial speech from other expression; hence, regulation to the extent permitted for commercial speech is not appropriate simply because a commercial medium has been selected for the communication of noncommercial ideas. (*City of Indio v. Arroyo* (1983) 143 Cal.App.3d 151, 158.) In sum, like any other time, place and manner regulations, those of a shopping center are constitutionally reasonable only if they are narrowly drawn and limited to the end of promoting specifically identified substantial interests.

The appropriateness of applying the traditional analysis of time, place and manner regulations to the instant matter is reinforced by the distinction between the Plaza and the privately-owned "quasi-public" forums identified in *Hoffman, Diamond I* and *Robins*. In each of those cases, the facility and the land upon which it stood were wholly owned by private enterprises which acquired their "quasi-public" status solely from the manner in which the facilities were used. In contrast, the Plaza does *not* own the land upon which it stands or the three underground parking garages which accomodate its customers. The city exercised its powers of eminent domain to permit the development of the Plaza and financed construction of the parking facilities through its redevelopment agency; the Plaza pays rental fees for the use of the parking facilities.

The integrated nature of the publicly-owned land and parking structures and the privately-owned Plaza has been commented upon previously. (See *Graydon v. Pasadena Redevelopment Agency* (1980) 104

Cal.App.3d 631, 634-635.) When a public entity so far insinuates itself into a position of interdependence with the private enterprise, the public entity becomes a joint participant in challenged activity. (*Burton v. Wilmington Pkg. Auth.* (1961) 365 U.S. 715, 725.) In these circumstances, it is clear the constitutionality of plaintiffs' regulations must be assessed by "a balancing of interest and a determination that [the party] has used the 'least restrictive means' to regulate the conduct in question." (*Spiritual Psychic Science Church v. City of Azusa* (1985) 39 Cal.3d 501, 517.)

Defendants challenge nearly every aspect of plaintiffs' regulatory scheme for political petitioning, beginning with the preamble to the written rules. They maintain that the definition of political petitioning as "any conduct by which an individual obtains signatures for any petition directed to any governmental or political body" discriminates against other expressive activity based on content. The trial court ruled the preamble must be read to include within its definition the solicitation of political contributions, but defendants argue petitioners still are barred from explaining their views to Plaza patrons, distributing explanatory literature or making visual presentations in support of their views. This interpretation of the definition is unduly narrow. By logical inference, any or all of the activities purportedly barred play a central role in obtaining political petition signatures. The *reason* for the petition and its supporting rationale provide the only sound basis for inducing a citizen to sign it. Logic dictates that the definition be given this expansive interpretation; so interpreted, it is free from constitutional defect.

Defendants also attack the application process, which is embodied in Rule 1 of the written rules, the registration form itself and an unwritten rule. This regulatory complex requires that an individual or organization wishing to utilize plaintiffs' property for political petitioning submit a written application. The following information must be provided: the name and address of the individual or group seeking to engage in expressive activity; the name and "identification" number of the person "in charge"; the "nature" of the political petition for which signatures are sought; the date and time applicants wish to engage in petitioning activity; whether written literature will be distributed; the number of persons who will participate and a telephone number for contact. In addition, the applicant must provide the name, address and telephone number of a "responsible person" who will expressly assume full liability for any "damage, costs or expenses." The sole criteria for determining whether an application will be denied is whether the planned activity will "adversely affect the shopping center environment, atmosphere or image."

In promoting their legitimate ends, plaintiffs have a clear and substantial interest in distinguishing between political and nonpolitical activity; hence, they may inquire in general terms about the "nature" of the petition at issue, i.e., is it directed to city hall, a department of city or county or state government, is it a proposed ballot measure? Similarly, given plaintiffs' substantial interest in avoiding the disruption of normal business and interference with patrons, they have the right within reasonable limits to plan the date, time, location and size of the petitioning activity and this requires communication. Communication, in turn, requires some means of contacting the individual or

organization seeking to engage in expressive activity; a telephone number provides a reasonable means of communication.

More specific identification, such as an address and "identification" number, provides a reasonably limited means of determining the identity and location of the applicant in the event the Plaza finds it necessary to pursue a liability claim. Defendants rely on *Rosen v. Port of Portland* (9th Cir. 1981) 641 F.2d 1243, which states: "The requirement that those desiring to exercise free speech rights identify themselves and supply the names, addresses, and telephone numbers of sponsoring or responsible persons . . . has a 'chilling effect' on free speech." (At p. 1250; see also *Talley v. California* (1960) 362 U.S. 60, 64.) Hence, any such requirement must not exceed the least drastic means which will achieve plaintiffs' legitimate purpose. (*Shelton v. Tucker* (1960) 364 U.S. 479, 488.)

In the instant matter, plaintiffs' substantial interests diverge from those of a purely public entity. The detailed information required in the registration form provides the least drastic means of assuring plaintiffs some protection from unduly burdensome nonincidental costs which may flow from petitioning activity; they need not assume the same degree of risk which a public entity may be asked to bear. However, the "guarantee" of liability by a "responsible person" required by Rule 1 exceeds the "least restrictive means" standard. Clearly, if mere identification may have a "chilling effect" on free speech, the effect of a demand that a designated "responsible person" expressly assume "all liability" will be most profound. So long as plaintiffs possess the other information requested, they know all

that is necessary to identify the party "responsible" and pursue any legal remedies.

Most importantly, the standard set forth in the unwritten rule governing whether an application will be accepted or rejected is fatally flawed. It confers broad, unbridled discretion on Plaza management, permitting rejection on a determination the planned activity will "adversely affect the shopping center environment, atmosphere or image." Any procedure regulating expressive activity which confers such unbounded discretion permits a decision to be based impermissibly on the content of expression. (*Dillon v. Municipal Court* (1971) 4 Cal.3d 860, 869-870.) To be valid, the regulation of expression must provide definite, objective written guidelines for the exercise of discretion. (*Ibid.*; accord, *Dulaney v. Municipal Court* (1974) 11 Cal.3d 77, 86; *Carreras v. City of Anaheim* (9th Cir. 1985) 768 F.2d 1039, 1049.) Since plaintiffs provide no definite, objective guidelines whatever as to how discretion is to be exercised in making the general, subjective determination an expressive activity will "adversely affect" the Plaza "environment, atmosphere or image," the standard necessarily is constitutionally defective.

In sum, much of plaintiffs' application procedure, encompassing the registration form, the unwritten rules mandating written application and conferring unbridled discretion to deny an application on the basis of general, subjective criteria only and Rule 1 requiring a designated "responsible person's" acceptance of "all liability," is overbroad and therefore constitutionally invalid. (*Morris v. Municipal Court, supra*, 32 Cal.3d at p. 565.)

While there is a plethora of authority identifying the type of regulation which fails to pass constitutional muster, we note the dearth of authority which provides any form of guidance as to the type of regulation which is valid. To the end of foreshortening the prospects of increased litigation on this issue, we will undertake to fill the void.

In replacement of the overbroad and subjective standard for accepting or rejecting applications for expressive activity, we suggest the type of objective written standard which would withstand constitutional scrutiny. In our view, the following criteria meet that test: (1) Whether the planned activity is to be presented in a noisy, disorderly or inflammatory manner as opposed to a neat, orderly and courteous manner; (2) whether the planned manner of presentation threatens to (a) interfere with the conduct of business or the customary uses of the property, either by its form, its size, its location or its timing (e.g., coinciding with peak business hours or days); (b) impede the movement of customers or tenants; or (c) block access to facilities and businesses; (3) whether the planned manner of presentation is confrontational to a degree that it is probable it will create a disturbance; and (4) whether the planned size or location of the activity threaten personal safety, in that it may block the flow of traffic or create a hazardous degree of congestion. Employing these criteria in concert with other standards we suggest *post*, avoids the vice of that unbridled discretion which lends itself to regulation on the basis of content.

Defendants next attack Rule 2, which requires a $50 cleaning deposit if leaflets are to be distributed; the deposit is refundable to the extent costs are not

incurred. A registration fee or deposit may be required where the permitting authority will likely incur additional cost from the exercise of expressive rights as long as it bears a reasonable relationship to the costs likely to be incurred. (*Cox v. New Hampshire* (1941) 312 U.S. 569, 577.) In the instant matter, the amount of the deposit, $50, is little more than de minimus and does not appear excessive in light of the costs likely to be incurred in cleaning litter from a facility of this size. Hence, it is a reasonable regulation.

Rule 3 mandates that persons engaging in petitioning activity use only that portion of plaintiffs' property which management expressly designates for that purpose. An unwritten rule generally places such activity in Garfield Court, the larger courtyard area on the first floor of the Plaza. Defendants argue that Rule 3 is invalid, in that it contains no requirement that an area *be* designated; they misperceive the problem. Facially, Rule 3 suffers from no defect, but it must be read in connection with the unwritten rule assigning petitioners to Garfield Court. That rule can be interpreted either as carrying the fair implication that no other area will be designated, notwithstanding suitability or availability, or simply as indicating a preference for Garfield Court.

If the former interpretation is to apply, the rules, read together, are unreasonably restrictive for plaintiffs made no showing whatsoever that there is no location in their extensive common area, other than Garfield Court, which could accomodate expressive activity. A regulating authority may not adopt rules which preclude the exercise of free expression in an appropriate place, even on the ground another place is available. (*California Newspaper Publishers Assn., Inc. v.*

City of Burbank (1975) 51 Cal.App.3d 50, 54; see also *Dillon v. Municipal Court, supra,* 4 Cal.3d 860, 869-870.) Under this interpretation, the rules do just that and therefore fail to pass constitutional muster.

If the latter interpretation governs, Rule 3 remains defective. It confers on Plaza management unbounded discretion to choose the site of petitioning activity should Garfield Court be unavailable. Absent definite, objective written criteria for determining an alternative location or for refusing to provide any location, Rule 3 therefore is invalid. (*Ibid.*)

Again, the formulation of objective criteria would cure the defects in Rule 3 and its companion unwritten rule. First, it would be reasonable for plaintiffs to determine and to specify that problems of littering justify limiting any applicant who intends to distribute literature to the Garfield Court area. Second, plaintiffs possess information from which they can determine the maximum number of petitioning activities of a certain size which can be accomodated in Garfield Court at one time on a normal business day and during both peak and non-peak business hours. Once those maximums are specified, the foundation exists for objective determinations: (1) Whether the applicant intends to distribute literature and, if so, (2) whether there remains sufficient space in Garfield Court on the requested day and during the requested hours to accomodate this activity; (3) if there is no remaining available space, whether the applicant is willing to make adjustments in the day, hours or size of the presentation which will permit accomodation of the activity or to forego the distribution of literature.

This last inquiry is critical, for it is clear other areas of the courtyard can accommodate expressive activity

which is small and avoids obstructing or interfering with the public or Plaza business operations. For instance, an applicant may be willing to limit petitioning to one or two persons equipped only with a clipboard holding the petition and pen to facilitate obtaining signatures who will agree to circulate politely and unobtrusively in areas outside of Garfield Court. Again, plaintiffs possess the means for objectively determining the maximum amount of such petitioning traffic other courtyard areas reasonably can accommodate under normal business conditions.

Having established criteria for normal business conditions, plaintiffs also possess the information necessary to objectively determine the effect of special events, such as sales or special commercial displays. Such determinations should focus on the size and nature of the special event, i.e., whether a sale involves one or more anchor stores or is mall-wide.

Rules 4 and 5 leave the number of petitioners who may engage in expressive activity at a given time and the time during which the activity may take place solely within the discretion of the Plaza management. The rules set forth guidelines governing the determination: "(1) the area available . . . (2) the number of petitioners who wish to engage in such activities at one particular time; (3) the potential for conflict between petitioners or between petitioners and members of the public; and (4) the safety of the public and center property." In addition, an unwritten rule limits the number of petitioners engaging in any one expressive activity to a maximum of two.

The "area available," "potential for conflict," and "safety of the public and . . . property" all involve general, subjective determinations. The latter two

categories fall squarely within those criteria long recognized as vague, uncertain or overbroad. (See, e.g., *City of Indio* v. *Arroyo, supra,* 143 Cal.App.3d at pp. 160-161; *City of Imperial Beach* v. *Escott* (1981) 115 Cal.App.3d 134, 138-139; *Carreras v. City of Anaheim, supra,* 768 F.2d at p. 1049.) The former category is equally vague and subjective absent some guidance as to how "available area" is to be determined. As noted *ante,* objective criteria can be established readily for making such an assessment.

The "number of petitioners who wish to engage in such activities" does provide a measurable standard relevant to the decision to be made. However, it is meaningless standing alone. Without definite, objective guidelines to which it may be related, the standard provides no means for determining the issues under consideration in Rules 4 and 5. Moreover, the unwritten rule limits petitioners to a maximum of two persons. Again, given the size of the facility at issue in the instant matter and the lack of justification provided, that restriction is unreasonably narrow and impermissibly infringes on the right to select a reasonable manner of engaging in expressive activity. (See *Dillon v. Municipal Court, supra,* 4 Cal.3d at pp. 869-870; cf. *California Newspaper Publishers Assn., Inc. v. City of Burbank, supra,* 51 Cal.App.3d at p. 54.) However, written criteria such as those outlined *ante* would provide the necessary objective guidance.

Finally, while the "potential for conflict" and concern with "safety" are too vague and overbroad, it is possible to craft objective criteria which meet those concerns: (1) whether the planned manner of presentation of the expressive activity is so confrontational in nature, e.g., through the use of "fighting words" or

group chanting, it is likely to embroil other groups or the general public in open conflict; (2) whether groups with competing views or incompatible political philosophies, i.e., the Ku Klux Klan and the NAACP or the Jewish Defense League; pro-life and pro-choice groups, have requested the use of the same general area on the same date and during the same hours; and (3) whether the planned activity, by its size and/or timing, threatens to block the flow of traffic or create a hazardous degree of congestion.

Plaintiffs argue the constitutionality of these rules and others which provide broad discretion without the safeguard of objective standards must be considered in light of the constitutional purpose served in circumscribing the exercise of discretion by requiring the use of objective standards. They point to the acknowledged principle that discretion must be circumscribed because unbounded discretion permits a decision to be based on the content of expression (*Dillon, supra*, 4 Cal.3d at pp. 869-870) and the unwritten rule that Plaza management is not to concern itself with the content of expression. They argue, since they have guarded against the vice of unbounded discretion the rules are valid. This argument overlooks the nature of the subjective determinations presently to be made: First, will the expressive activity be permitted or does it "adversely affect the . . . environment, atmosphere or image?" Second, based on the area available, the "potential for conflict" and "safety," where will the activity take place? Third, based on those same factors, how many persons will be permitted to take part? Notwithstanding plaintiffs' unwritten rule, all of those determinations readily may focus on the content of expression. Absent objective guidance, how else is management to perceive an "adverse affect" or a

"potential for conflict?" The unwritten rule cannot adequately substitute for the use of definite, objective guidelines.

Rule 6 requires that petitioners use only furniture approved by management and locate that furniture only "as prescribed by . . . management. . . ." An unwritten rule states the Plaza will provide a table with table cloth and two chairs — no other furniture. This provision operates in a fashion similar to Rule 3 and its companion unwritten rule. Accordingly, to avoid running afoul of the same constitutional defect, it must be interpreted as prohibiting all other furniture; otherwise, it again confers on Plaza management unbounded discretion. While the Plaza's legitimate concerns amply justify exercising control over the type and appearance of furniture to be used by providing only certain items and guarding against undue congestion or interference with plaza business by so limiting quantity, Rule 6 and its unwritten companion must be integrated in one written rule. Applicants are entitled to clear, written advance notice as to precisely what will be approved.

Rule 7 makes any posters, placards or displays subject to management approval and leaves their location and method of display within management's sole discretion. There are no definite, objective guidelines provided. The trial court modified Rule 7 to limit management approval to such considerations as number and size, rather than content, but the modification will not suffice to save the rule. The number and size of posters or displays, as well as their method of display and location, all entail decisions which are likely to be influenced by content in the

absence of specific guidance. Like others of plaintiffs' rules, Rule 7 must fall as unconstitutionally overbroad.

Again, however, we stress the possibility of crafting the objective criteria necessary. Plaintiffs may wish to consider the general scheme of signs and displays permitted for special commercial exhibits and establish sizes and quantities which will be approved. Any proposed exceptions could be governed by considering whether the number and/or size of signs, posters or placards will interfere with and/or directly compete with business displays or logos. Further, plaintiffs could regulate style, as opposed to content, requiring that it be compatible with the general aesthetics of the mall, i.e., neat in appearance. The use of "fighting words," obscenities, grisly or gruesome displays or highly inflammatory slogans likely to provoke a disturbance, of course, could be prohibited. Examples of the latter would be pictures of aborted fetuses, gross racial caricatures or slogans such as "kill the pigs now."

Defendants characterize Rule 8 as a prior restraint on free expression. The rule prohibits petitioners from making an "express or implied representation to any person within the center or on center property that the owner or the manager of the center sponsors or supports any view, belief, or request contained in any petition, statement or literature being disseminated or exhibited on center property."

Since a shopping center is a business establishment open to the public for use at its pleasure, the views of those engaging in expressive activity are not likely to be identified by the public with those of the owner. (*Pruneyard Shopping Center v. Robins*, (1980) 447 U.S. 74, 87.) Moreover, the owner may protect him or

herself by expressly disavowing those views, i.e., by posting a sign. (*Ibid.*) Defendant's view of Rule 8 is that it puts the burden on them, imposing a prior restraint on their expression, when there are less restrictive means of protecting plaintiffs' interests. Insofar as Rule 8 restrains speech, it restrains only that which is unprotected in the first instance — expressions which could be considered fraudulant representations or defamatory to plaintiffs. In actuality, the rule imposes no more of an unconstitutional restraint than does a statute which prohibits the exhibition of an obscene film; defendants simply are put on notice that they are not privileged to misrepresent plaintiffs' sponsorship or advocacy of their views — nothing more. So interpreted, Rule 8 suffers from no constitutional defect.

Rule 9 prohibits the use of lights, loudspeakers or other electrical or mechanical equipment, while Rule 10 prohibits the use or operation of any musical instrument or sound reproduction device "in such manner as to cause any sound or noise which, in the reasonable belief of the center management office, may be disturbing or offensive." In substance, Rule 10 leaves the determination of whether any musical instrument or sound device may be used in expressive activity solely within the discretion of management. That discretion is unbounded and unguided by any objective standard. Whether a sound is "disturbing" or "offensive" necessarily involves the same kind of subjectivity as do "esthetics," "well-being" and "safety." (See *City of Indio* v. *Arroyo, supra,* 143 Cal.App.3d at pp. 160-161.) Hence, Rule 10 is unconstitutionally overbroad.

Here, too, plaintiffs can fill the void with reasonably objective criteria, i.e.: (1) Whether the sound device will create noise of sufficient volume to impinge on the hearing and peace of the general public, as opposed to those persons within a few feet of petitioners; (2) whether the device will be used in a highly confrontational manner likely to create a disturbance, e.g., to play discredited anthems or slogans akin to "fighting words"; and (3) whether the planned use of the device is highly inflammatory. (See examples set forth *ante*, in discussing Rule 7.)

Rule 9 prohibits the use of lights, loudspeakers or other mechanical or electrical equipment. A prohibition against lights or loudspeakers is entirely justifiable in the protection of the Plaza environment and its peaceful use and enjoyment. Moreover, the Plaza certainly is not obliged to furnish petitioning parties with electrical power. The balance of the apparently sweeping restriction against all electrical or mechanical equipment must be read with Rule 10, which permits approval of the use of musical instruments or sound devices. Given the operation of Rule 10, the broad restrictions of Rule 9 do not run afoul of the principle that the selection of an appropriate manner of engaging in expressive activity may not be precluded by plaintiffs' rules. (*Dillon v. Municipal Court*, *supra*, 4 Cal.3d at pp. 869-870; cf. *California Newspaper Publishers Assn., Inc. v. City of Burbank*, *supra*, 51 Cal.App.3d at p. 54.) It follows that Rule 9, as interpreted here, is constitutionally valid.

Rule 11 prohibits the solicitation of "contributions or donations from anyone on center property," as well as "the sale of any items or services on said property." The trial court found this rule to be constitutionally

defective insofar as it prohibited the solicitation of contributions or donations and exempted defendants from compliance to that extent. On appeal, defendants do not challenge the balance of the rule, but plaintiffs do challenge the trial court's limitation on cross-appeal. Accordingly, we defer consideration of that issue to the consideration of the cross-appeal, *post*.

Rule 12 requires that petitioners "not impede or interfere with the business of any center tenants, employees or personnel, nor shall they approach, detain, or in any way impede or interfere with the smooth flow and free passage of center patrons, customers or personnel through the access ways of the center." Defendants characterize the "impede or interfere" language as overbroad and vague. However, such language has been upheld as sufficiently narrowly drawn "to avoid arbitrary and unnecessary curtailment of freedom of speech." (*Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal.3d 294, 303.) Hence, defendants' challenge must fail.

The trial court found Rule 12 to be infirm insofar as it prohibits the "approach" of patrons and, again, exempted defendants from compliance to that extent. Plaintiffs also challenge the court's ruling in this regard. Hence, the validity of that exemption will be considered together with the ruling on Rule 11 in addressing the cross-appeal.

Defendants challenge Rule 13 as impermissibly imposing a penalty for the exercise of rights of free expression. Rule 13 confers upon Plaza management discretion to determine whether "the measure of the proposed political petitioning activity creates a risk of injury or damage to person or property, and . . . such a risk warrants special insurance protection," which the

applicant must then provide. "Risk of injury" is yet another general and subjective standard vulnerable to arbitrary or content-related determination. It is closely akin in value as a standard to "danger to public"; in a word, it is fatally defective. (*Hague v. C.I.O.* (1939) 307 U.S. 496, 516.) Neither is there any indication as to how management is to determine the risk "warrants special insurance protection." In its totality, Rule 13 is unconstitutionally overbroad.

Once again, it is possible for plaintiffs to craft the necessary objective criteria, i.e.: (1) Whether there is a prior history of injury to persons or property when this group engages in expressive activity; (2) whether there is a prior history of injury to persons or property when similar groups engage in expressive activity; (3) the historical scope of the risk and whether it exceeds the minimal or inconsequential; (4) whether the risk can be lessened or eliminated by adjusting the time, date, place or planned manner of expression; and (5) if so, whether the applicant is willing to make such adjustments.

Plaintiffs sought a preliminary injunction requiring defendants to submit to their application process and to comply with all rules and regulations. With very few exceptions, the trial court granted that relief. Since a significant part of plaintiffs' application process and by far the majority of the written and unwritten rules are constitutionally defective,[1] it is clear plaintiffs were not

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[1] Contrary to the dissent's characterization, our "heightened scrutiny and detailed rule-by-rule analysis," while based in part on federal constitutional standards, is limited to those principles implicit in *Robins'* firm reliance on *In re Hoffman, supra,* 67 Cal.2d 845. Moreover, as we noted *ante,* at pages 16 and 17, the instant matter differs substantially from *Robins* in the significant public interdependence with the private enterprise.

entitled to that relief. It follows that the trial court erred in granting a preliminary injunction. (*People v. Pacific Land Research Co.* (1977) 20 Cal.3d 10, 21.)

II

Defendants further contend the trial court erred in issuing a temporary restraining order, in that the invocation of the plaintiffs' rules and regulations impermissibly restricted defendants' exercise of their First Amendment rights. We cannot agree.

All parties agree the issues pertaining to the temporary restraining order are now moot. Defendants nevertheless urge this court to reach them. Notwithstanding that they have become moot, the courts may make an exception and consider issues raised on appeal with respect to ex parte restraining orders. As noted in *United Farm Workers of America v. Superior Court* (1975) 14 Cal.3d 902, 906, these orders can and do have a critical impact on the exercise of fundamental rights. "Yet because of their limited duration, orders of this nature elude appellate review." Hence, when a case poses an issue of broad public interest, likely to recur, an appellate court may exercise its "inherent discretion" to resolve the issue. (*Ibid.*)

The only issue raised with respect to the instant matter which might fall within the *United Farm Workers* exception is the Christmas holiday proscription against all petitioning activity. Given the likelihood this issue will arise again, yet elude review, we consider the case at bar appropriate for the exercise of this court's discretion to resolve the propriety of the holiday ban.

As *In re Hoffman, supra*, 67 Cal.2d at p. 853 notes: "In areas normally subject to congestion, . . . [protected] activities can be prohibited. [Citations.]" The evidence unequivocally establishes that the courtyard areas of the Plaza, particularly Garfield Court, are subject to a high degree of congestion during the Christmas holiday period. In addition to all regular features, the Plaza then accommodates a large Christmas tree, a Santa Claus display, a gingerbread house display and auction, an automobile raffle, booths for gift wrapping, mailing and gift certificates, a toy collection facility and various story book displays. Moreover, quite apart from the high degree of congestion created by the mere existence of these activities, pedestrian traffic increases substantially. While defendants did present evidence of light pedestrian traffic at 6:00 p.m. on December 23, the foregoing evidence nevertheless justified the trial court issuing the temporary restraining order to the extent it enforced the Christmas holiday ban on petitioning activity. Plaintiffs had the right and responsibility to keep the courtyard area open and available for movement. (Cf. *Cox v. Louisiana* (1965) 379 U.S. 536, 554.) We note, however, that the ban at issue never was reduced to writing. Inasmuch as applicants are entitled to clear, written notice of such proscriptions, any future ban should be set forth in writing, setting forth the dates during which it is in effect.

On Cross-Appeal

III

Plaintiffs assert the trial court erred in invalidating Rules 11 and 12 insofar as they proscribe the

solicitation of political funds or political petitioners' approach of Plaza patrons. We agree in part.

Plaintiffs rely on *Intern. Soc. for Krishna v. New Jersey Sports, etc.* (3d Cir. 1982) 691 F.2d 155, 159 and *Heffron v. Int. Soc. for Krishna Consc.* (1981) 452 U.S. 640 for the proposition that the solicitation of funds is not pure speech; hence, they argue, it is entirely permissible to prohibit the solicitation of political contributions on Plaza property. While the solicitation of political or other funds to be used to support the promulgation of views is indeed not "pure speech," it is activity protected by the First Amendment. (*Intern. Soc. for Krishna, supra,* 691 F.2d at p. 159; *Carreras v. City of Anaheim, supra,* 768 F.2d at p. 1045.)

Nevertheless, where the locale is not a public forum, solicitation need not be permitted. (*Intern. Soc. for Krishna, supra,* 691 F.2d at pp. 159-160.) Neither must solicitation be permitted when it is basically incompatible with the normal character and function of the facility. (*Id.*, at pp. 161-162.) In the instant matter, the solicitation of political funds is entirely incompatible with the normal character and function of the Plaza. The Plaza exists as a center of commerce; its function is to facilitate the ease of commerce and to promote the business of its merchant tenants. Any activity seeking to solicit political contributions necessarily interferes with that function by competing with the merchant tenants for the funds of Plaza patrons. Since solicitation does interfere with the basic function of the Plaza, plaintiffs are entirely within their rights in prohibiting such activity. (*Ibid.*) It follows that the trial court erred in invalidating Rule 11 insofar as it proscribes the solicitation of political funds.

Plaintiffs also maintain defendants lack standing to challenge the solicitation prohibition, in that they did not seek to solicit funds. This viewpoint overlooks the nature of the instant action. In addition to injunctive relief, plaintiffs sought a declaration that its rules and regulations were constitutionally valid and enforceable. This conferred upon the trial court all necessary jurisdiction to decide the issue.

With respect to Rule 12, plaintiffs rely on *Kash Enterprises, Inc. v. City of Los Angeles, supra,* 19 Cal.3d at pages 303-304, which upheld language prohibiting acts which "impede or obstruct or unreasonably interfere" with others. That language does, indeed, mirror part of Rule 12 with which the trial court had no quarrel. The prohibition against "approaching" mall patrons stands in a different posture, however. As the trial court noted, "approaching" covers a far broader range of activity than physically impeding or obstructing persons and need not interfere with their passage or conduct of business in any manner. As a consequence, the proscription is overbroad, encompassing lawful, as well as unlawful, activity. (*Smith v. Silvey* (1983) 149 Cal.App.3d 400, 406-407; see also *In re Berry* (1968) 68 Cal.2d 137, 155.) It follows that it is constitutionally impermissible.

In sum, while Rule 11 is entirely valid, Rule 12 imposes an unconstitutional restraint on defendants' exercise of free expression. Accordingly, the trial court did err in partially invalidating Rule 11 but was correct in invalidating Rule 12's proscription against approaching Plaza patrons.

The order granting a preliminary injunction is reversed; the order granting a temporary restraining order is affirmed. Defendants to have costs on appeal.

CERTIFIED FOR PUBLICATION.

SPENCER, P.J.

I concur:

LUCAS, J.

HANSON (Thaxton), J., CONCURRING AND DISSENTING

I concur with the majority opinion in respect to the temporary restraining order pertaining to plaintiff Plaza's rules and regulations specifically concerning the holiday ban.

I also concur with the majority opinion's treatment of the issues relating to plaintiff Plaza's cross-appeal in respect to rules 11 and 12 of Plaza's "Rules for Political Petitioning on Shopping Center Property" (appendix A) which were attached to its complaint.

However, I respectfully disagree with the majority opinion's general treatment of the remaining paragraphs contained in Plaza's rules and the application procedure. This disagreement stems from what I perceive to be the applicable standard of review, language in *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, and the belief that generally we should decide each issue on the narrowest possible grounds on a case by case basis.

The standard of review with regard to the trial court's grant of a preliminary injunction is well-established. The decision to grant a preliminary injunction "rests in the sound discretion of the trial court. . . . " A trial court will be found to have abused its discretion only when it has "exceeded the bounds of reason or contravened the uncontradicted evidence." (*Continental Baking Co. v. Katz (1968) 68 Cal.2d 512, 527; see also City of Torrance v. Transitional Living Centers for Los Angeles, Inc.* (1982) 30 Cal.3d 516, 519.) The burden rests with the party challenging the injunction to make a clear showing of an abuse of discretion. (*IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69.)

With regard to the First Amendment rights involved in this appeal, however, the majority fails to apply the proper standard of review. The problem arises partly from the unusual nature of the constitutional right established in *Robins v. Pruneyard Shopping Center, supra,* 23 Cal.3d 899 (Opn. by Newman, J., with Bird, C.J., Tobriner and Mosk, JJ., conc. Separate dis. opn. by Richardson, J., with Clark and Manual, JJ., conc.).[1] *Pruneyard* holds that the California Constitution guarantees First Amendment rights exceeding those guaranteed by the United States Constitution. The United States Supreme Court, in *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74, affirmed the California Supreme Court's holding, expressly declin-

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[1] It should also be noted that the facts in the instant case diverge somewhat from those in *Pruneyard.* First, in *Pruneyard,* the shopping center management informed the petitioners that they would have to leave the premises entirely because they did not have permission to solicit, suggesting that they continue their activities on the public sidewalk at the center's perimeter. In the case at bench, there was no blanket prohibition of First Amendment expressive activity; instead, the management permitted this activity, subject to time, place, and manner regulations. Second, the *Pruneyard* opinion, by citing statistics concerning the growth of suburban communities and the economic and social importance of suburban shopping centers, implied that barring First Amendment expression in such shopping centers would leave the public without an alternative forum in which to engage in — or to hear — First Amendment expression. Here, by contrast, we note that the shopping center lies at the very center of the downtown shopping, business, and government activity of a large city, which is itself a regional commercial, governmental, and cultural center. The area contains innumerable and well-traveled streets, parks, and other traditional public forums available for First Amendment expression in a way that the suburban shopping center in *Pruneyard* evidently did not.

ing to "limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." (*Id.*, at 81.) So long as a state respects the federal constitutional minimum, it may define the maximum scope of constitutional rights. To echo the phrase of California Supreme Court Justice Stanley Mosk, so long as it rests its foundation on the federal floor, California may construct its own constitutional ceiling. (Mosk, *Beyond the Constitution* (Aug. 1987) 7 Cal.Law. 100.)

Since these enlarged First Amendment rights are creatures of state constitutional law, we must look to state law for the appropriate standard of reviewing private regulations of these state-created rights. The California Supreme Court in *Pruneyard*, however, has not expressly specified the standard for reviewing these regulations, except to say that they must be "reasonable." To clarify what this "reasonable" standard of review means vis-a-vis private regulation of public access to private property, it is helpful to recall the method by which federal courts analyze government limitations on public access to various sorts of public property.

Federal First Amendment cases link the standard of review to the type of property used by those seeking to exercise their rights of expression. "The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." (*Perry Education Assn. v. Perry Local Educators' Assn.* (1983) 460 U.S. 37, 44.) The federal standard of review changes according to the position a particular type of public property occupies along a "spectrum" of

various places in which First Amendment activity occurs. (*Id.*, at 45.) There are three such categories.

First, in traditional, "quintessential public forums," such as streets and parks, the government may not prohibit all communicative activity. To enforce a content-based prohibition, the State must show it is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. The State may enforce time, place, and manner of expression regulations which are content-neutral, narrowly tailored to serve a significant government interest, and leave ample alternative channels of communication open. (*Id.*, at 45.) The standards governing a second category, a designated public forum — public property which the State has opened to the public for expressive activity — are identical to those governing a traditional public forum, as long as the State retains the facility's open, public character. (*Id.*, at 45-46.)

A different standard, however, governs a third category: public property "not by tradition or designation a forum for public communication." (*Id.*, at 46.) "In addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." (*Id.*, at 46.)

Perry leads to the conclusion that the further a particular parcel of property lies from a "traditional public forum," the lower the standard of review. For two reasons, a *Pruneyard*-type forum falls into none of the three *Perry* categories. First, it is privately owned. Second, the limitations on the public's access to the property originates not from any governmental or

other public entity, but from the private owner. Thus, while " [f]ederal principles are relevant" in determining the standard of review to be accorded property in this fourth category, so long as federal rights are protected, federal standards of review are not conclusive. (*Robins v. Pruneyard Shopping Center, supra,* 23 Cal.3d 899, 909.) The standard of review for this "broader zone" of First Amendment expression, guaranteed by the California Constitution (*Blatty v. New York Times Co.* (1986) 42 Cal.3d 1033, 1041) is lower than the federal standards of review, and a matter for articulation by the California courts.

Pruneyard states that the California Constitution "protect[s] speech and petitioning, *reasonably* exercised, in shopping centers even when the centers are privately owned." (*Robins v. Pruneyard Shopping Center, supra,* 23 Cal.3d 899, 910; emphasis added.) The opinion noted that property owners, like the government, may regulate expressive activity as to time, place, and manner, "under *reasonable* regulations adopted by [the property owner] to assure that these activities do not interfere with normal business operations." (*Id.*, at 909-911; emphasis added.)

We are not dealing here with an ordinance or a statute but "rules" obviously prepared, in good faith, with *Pruneyard* in mind, by property owners who operate a mall for commercial purposes.

The superior court in its "Statement of Decision" (appendix B) also specifically noted that it considered *Pruneyard*. Moreover, its rulings as to each paragraph in the "rules" as applied only to the litigants herein was an effort to reach a reasonable accommodation of the rights of all parties. The trial court necessarily could not make a ruling that would be dispositive of proposed

activities of persons and organizations not before the court.

After reviewing the record, Plaza's "Rules" (appendix A), and the "Statement of Decision" (appendix B) underpinning the preliminary injunction, except for Plaza's "Rules" 11 and 12, I cannot say that the superior court "exceeded the bounds of reason or contravened the uncontradicted evidence."

The majority's heightened scrutiny and detailed, rule-by-rule analysis is based on federal constitutional principles. The type of forum involved in the case at bench, and the California *Pruneyard* "reasonableness" and the *Katz* "abuse of discretion" standards of review, in my opinion, make the majority's detailed analysis unnecessary. The majority opinion attempts to clarify the legal requirements applicable to regulations of First Amendment access to a *Pruneyard*-type forum. The purpose of the majority's treatment is directed at "foreshortening the prospects of increased litigation" but in effect amounts to a rewriting of Plaza's rules. While this purpose may be laudable, in my view, it has the flavor of another incremental unwarranted whittling away of private property rights and the management of said private property. Moreover, because of a myriad of unforeseen circumstances such a detailed treatment for prospective purposes may increase the likelihood of future litigation, rather than reduce it. In my view it is preferable to follow the traditional procedure of deciding the issues raised in the case before us on the narrowest possible ground, and to decide any future litigation involving a *Pruneyard*-type forum on a case by case basis.

I would affirm the order granting a temporary restraining order. I would also affirm the superior

court's order granting a preliminary injunction, except to that portion of the order pertaining to paragraphs 11 and 12 of plaintiff Plaza's "Rules for Political Petitioning on Shopping Center Property," which I would reverse. I would order each of the parties to bear their own costs.

HANSON (Thaxton), J.

RULES FOR POLITICAL PETITIONING ON SHOPPING CENTER PROPERTY

"The rules are promulagated by the management of The Plaza Pasadena shopping center (center) for the purpose of reasonably regulating as to time, place and manner the activities of all individuals, groups and organizations (hereinafter referred to as petitioners) engaged in "political petitioning" on said center's property. "Political petitioning" is defined as any conduct by which an individual obtains signatures for any petition directed to any governmental or political body. These Rules shall not be deemed or construed to permit any activity other than political petitioning, and the owners of the center reserve the right to prohibit any activity other than that specifically described in these Rules and sanctioned by law.

"1. Prior to engaging in political petitioning, a petitioner must notify the center management office and provide it with the name, address and signature of a responsible adult who, by said signature, expressly accepts full liability for damage, costs or expenses resulting from the proposed activity. Said liability shall include, but is not limited to, maintenance costs for cleaning up litter and expenses resulting from damage to persons or property or both.

"2. If leaflets or other material are to be handed out on the center property, the petitioner must post a $50.00 security deposit to cover the cost of cleaning up litter which results from such activity. The deposit, less any expense incurred by center for cleaning up litter, shall be refunded approximately two weeks after said activity has ended.

APPENDIX "A"

"3. All petitioners engaged in political petitioning shall use only that portion of the center property expressly designated for that purpose by the center management office.

"4. The number of petitioners who may engage in political petitioning on the center property at a particular time shall be determined by the center management office. This determination shall be based on the following factors: (1) The area available for such activities; (2) the number of petitioners who wish to engage in such activity at one particular time; (3) the potential for conflict between petitioners or between petitioners and members of the public; and (4) the safety of the public and center property.

"5. The time during which political petitioning by a particular petitioner may take place shall be determined by the center management office. This determination shall be based on the factors specified in Rule 4.

"6. Only that furniture (i.e. table, chairs and benches) approved by the center management office shall be used on the center property for political petitioning. Said furniture shall be located as prescribed by the center management office.

"7. Posters, plaquards [*sic*] and displays as well as their location and method of display shall be subject to the approval of the center management office. In no event shall such materials be affixed to any portion of the center property.

"8. Petitioners shall make no express or implied representation to any person within the center or on center property that the owner or the manager of the center sponsors or supports any view, belief, or request

contained in any petition, statement or literature being disseminated or exhibited on center property.

"9. No lights, loudspeakers or other electrical or mechanical equipment, device or appliance shall be used for any purpose by petitioners at the center.

"10. No petitioner shall use, operate or permit to be played any musical instrument or other device for the production or reproduction of sound in such a manner as to cause any sound or noise which, in the reasonable belief of the center management office, may be disturbing or offensive.

"11. Petitioners shall not solicit contributions or donations from anyone on center property nor shall they engage in the sale of any items or any services on said property.

"12. Petitioners shall not impede or interfere with the business of any center tenants, employees or personnel, or shall they approach, detain or in any way impede or interfere with the smooth flow and free passage of center patrons, customers or personnel through the access ways of the center.

"13. If in the good faith judgment of the center management office the nature of the proposed political petitioning activity creates a risk of injury or damage to person or property, and that such a risk warrants special insurance protection, then the petitioner planning to engage in such activity must purchase and carry the necessary insurance coverage. Said insurance policy shall name as additional insureds Hahn Property Management Corporation, the center owner and the center Merchants' Association and petitioner shall provide the center manager prior to commencement of political petitioning with a valid certificate of insurance evidencing the same.

"14. Any petitioners engaging in political petitioning shall conduct themselves with proper decorum and must refrain from any loud or raucous activity which will annoy or offend the public or any tenants at the center. Any petitioner engaging in political petitioning who defaces or otherwise abuses center property or persons on center property shall be subject to immediate removal and legal action.

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

H-CHH ASSOCIATES, a California limited Partnership, doing business as PLAZA PASADENA, and HAHN PROPERTY MANAGEMENT CORPORATION, a California Corporation,	)	CASE NO. C 580 408
	)	STATEMENT OF DECISION
Plaintiffs,	)	
vs.	)	
CITIZENS FOR REPRESENTATIVE GOVERNMENT, an unincorporated association, dba PASADENA CITIZENS FOR REPRESENTATIVE GOVERNMENT, DALE L. GRONEMEIER, JOHN HINRICHS, OZRO ANDERSON, CHRIS SUTTON, JANE POE, JOHN	)	

ROE, AND DOES I through 1,000, inclusive,

Defendants,

CITIZENS FOR REPRESENTATIVE GOVERNMENT, an unincorporated association; DALE L. GRONEMEIER,

Cross-Complainants,

vs.

HAHN PROPERTY MANAGEMENT CORPORATION; a California corporation; H-CHH Associates, a California limited partnership dba THE PLAZA PASADENA; ERNEST W. HAHN CO., INC. a California corporation; PATTI K. MAUDE; DOES 1001 - 1100 inclusive,

Cross-defendants.

I. Motion by Plaintiff for Preliminary Injunction.

A. In granting or denying any relief on this Motion, the Court shall at this preliminary injunction stage rule only on the rights of the named parties and not on the rights generally of the public or of groups not expressly made parties herein.

Additionally, as to defendant/cross-complainant Citizens for Representative Government, the claim for relief relating to the period from Thanksgiving through Christmas, 1985 is now moot and the Court shall not rule upon this issue. If this case has not gone to trial in November, 1986 and defendants/cross-complainants propose to engage in political activity during the Thanksgiving-Christmas period at plaintiffs' premises, they may apply to the Court for appropriate relief.

B. The Court has reviewed and considered the "Rules for Political Petitioning on Shopping Center Property", (Exh. A, Complaint) as they apply to the proposed activity of defendant/cross-complainant Citizens for Representative Government and its officers, members and agents Dale L. Gronemeier, Ozro Anderson and Chris Sutton.

As so applied, the Court makes the following rulings as to each of the provisions of said "Rules" *as applied to the defendants/cross-complainants only.*

> *Opening paragraph* (unnumbered): The definition of "political petitioning" is unreasonable to the extent it does not include distribution of written materials or solicitation of funds.
>
> *Paragraph 1*: This provision is reasonable. Defendants/cross-complainants do not claim they are minors.

Paragraph 2: This provision is reasonable.

Paragraph 3: This provision is reasonable.

Paragraph 4: This provision is reasonable on its face. Whether it would be unreasonably applied would depend on the circumstances of the particular case. Defendants/cross-complainants have not shown that it would be unreasonably applied on any application filed by them for future activity.

Paragraph 5: This provision is reasonable on its face and the Court makes the same ruling as in paragraph 4 above.

Paragraph 6: This provision is reasonable.

Paragraph 7: This provision is reasonable as to the size, number, and location of posters, plaquards, and displays. It is unreasonable as to approval of the content thereof to the extent the content falls within the definition of "political petitioning".

Paragraph 8: This provision is reasonable.

Paragraph 9: This provision is reasonable.

Paragraph 10: This provision is reasonable.

Paragraph 11: This provision is unreasonable to the extent it prevents defendants/cross-complainants from soliciting contributions to support the political causes they advocate. Otherwise, the provision is reasonable.

Paragraph 12: This provision is unreasonable to the extent it does not permit the "approach" of patrons by defendants/cross-complainants within a reasonably described radius of the location where the table is

situated. Otherwise, the provision is reasonable.

Paragraph 13: This provision is reasonable on its face so long as the requirement of issuance is based upon articulat facts and not mere conjecture or speculation.

Paragraph 14: This provision is reasonable on its face. The term "loud and raucous activity" is not impermissibly vague.

C. Ruling as to "Registration Form."

The Court has reviewed this form. (Exh. A, Cross-complaint.) On its face, the Court finds it is reasonable. Requiring the names of persons making the application and the names of persons in charge of the activity is reasonable. Requiring the submission of a copy of the petition is a reasonable means of determining that the proposed activity involves "political petitioning" rather than other activity, e.g., commercial promotion or solicitation.

D. The Court grants plaintiffs' Motion for Preliminary Injunction restraining and enjoining defendant Citizens for Representative Government, an unincorporated association, its officers, members, employees and agents and the individual defendants Dale L. Gronemeier, Ozro Anderson and Chris Sutton, their agents, servants, and all persons acting in concert with any or all of the foregoing defendants from:

1. engaging in any political activity on the premises of Plaza Pasadena, Pasadena, California, including but not limited to parking areas physically connected therewith until said defendants have caused to be submitted to plaintiff an application or

registration and have received approval by plaintiff for such activity;

2. violating or failing to comply with the rules and regulations adopted by plaintiffs except that such rules and regulations may not:

(a) regulate the political content of any sign, poster or display except as to the size of the sign, poster or display.

(b) prohibit solicitation of political contributions at the location designated for the political activity, provided, however, plaintiff may prescribe a reasonable radius surrounding the table beyond which defendants may not approach persons for contributions.

(c) prohibit defendants from approaching persons within a reasonable radius of the table where the political activity is permitted so long as defendants do not physically impede such person.

E. The preliminary injunction is conditioned upon plaintiff filing a $10,000 bond.

F. The Court reserves jurisdiction to modify or dissolve the preliminary injunction for good cause shown.

II. COMMENT OF THE COURT

A. The Court disagrees with the position of defendants/cross-complainants to the extent that they contend their right of political expression on the premises of a private shopping mall is subject to no less restraint than that on a public sidewalk or public premises. The Court is guided principally by the criteria in *Robins v. Pruneyard Shopping Center* 23 Cal.3d 899, 910, 911 which requires a shopping mall,

such as here, to permit "a handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adapted . . . to assure that these activities do not interfere with normal business operations . . . "

B. In its rulings above, the Court has attempted to reach a reasonable accommodation of the rights of all parties. At the same time, the Court recognizes that it cannot make a ruling that would be dispositive of proposed activities of persons and organizations not before the Court. Accordingly, the rulings herein apply only to the parties before the Court.

IV. The restraining order issued herein on December 23, 1985 is continued in effect until January 17, 1986, 4:00 p.m. to allow plaintiffs to submit preliminary injunction.

Dated: January 13, 1988

WARREN H. DEERING
Judge of the Superior Court

APPENDIX B

Order Denying Rehearing by Court of Appeal

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 1 DATE: 06/26/87

Ball, Hunt, Hart, Brown & Baerwitz
Tom J. Leanse
120 Linden Avenue
P.O. Box 1287
Long Beach, CA. 90801

RE: H-CHH Associates Et Al.
vs.
Citizens For Representative Government
2 Civil B019051
Los Angeles NO. C580408

THE COURT:

Petition for rehearing denied.

APPENDIX C

Order Denying Petition for Review by California Supreme Court

ORDER DENYING REVIEW

AFTER JUDGMENT
BY THE COURT OF APPEAL

Second District, Division One,
No. B019051, S002307

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

H-CHH ASSOCIATES ET AL.,
Respondents,

v.

CITIZENS FOR
REPRESENTATIVE GOVERNMENT ET AL.,
Appellants

Respondents' petition for review DENIED.

The request for an order directing depublication of the opinion in the above-entitled cause is DENIED.

LUCAS

MALCOLM LUCAS
Chief Justice

APPENDIX D

Temporary Restraining Order by Trial Court

BALL, HUNT, HART, BROWN AND BAERWITZ
211 East Ocean Boulevard
Post Office Box 1287
Long Beach, California 90801
(213) 435-5631
Attorneys for Plaintiffs

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

H-CHH ASSOCIATES, a California limited partnership, doing business as PLAZA PASADENA, and HAHN PROPERTY MANAGEMENT CORPORATION, a California Corporation,	)	**CASE NO.**
	)	**PROPOSED TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION**
Plaintiffs,	)	
vs.	)	
CITIZENS FOR REPRESENTATIVE GOVERNMENT, an unincorporated association, dba PASADENA	)	**DATE: January 10, 1986** **TIME: 9:00 a.m.** **DEPT: 86**

CITIZENS FOR REPRESENTATIVE GOVERNMENT, DALE L. GRONEMEIER, JOHN HINRICHS, OZRO ANDERSON, CHRIS SUTTON, JANE POE, JOHN ROE, AND DOES I through 1,000, inclusive,	)
Defendants,	)

On reading the verified complaint f plaintiffs and the declarations and memorandum of points and authorities submitted therewith, and it appearing to the satisfaction of the court that this is a proper case for issuance of a temporary restraining order and/or an order to show cause, and that unless the temporary restraining order issues, plaintiffs will suffer great and/or irreparable injury before the matter can be heard upon notice,

IT IS HEREBY ORDERED that the above-mentioned defendants and each of them shall appear before this court in Department 86 on the 10th day of January, 1986, at 9:00 a.m., then and there to show cause, if any, why they, and their officers, agents, representatives, employees, and all persons acting in concert with them, should not be enjoined and restrained from entering, occupying, or using any portion of the Plaza Pasadena for the purpose of carrying on any activities connected with, on behalf of, or related to Citizens for Representative Government, or students petitioning the government to provide aid

to the Contras, or any other political cause, until and unless each individual, organization, or entity, shall have applied to and been authorized by the manager of Plaza Pasadena to conduct such activities and such activities are conducted in accordance with the Rules for Political Petitioning attached hereto as Exhibit "A".

From performing any of the following acts on any portion of Plaza Pasadena on behalf of, or related to, Citizens for Representative Government or students petitioning the government to provide aid to the Contras or any other politically related group:

(a) Distributing any pamphlets, literature, flyers, bumper strips, or other paraphernalia;

(b) Soliciting signatures of any persons, except from a location designated by plaintiffs and only on the days and during the hours that the mall is open to the public as specifically approved by the manager of Plaza Pasadena;

(c) Soliciting money from any persons;

(d) Using any form or furniture, equipment, displays, posters, or plaques, unless prior approval therefor has been obtained from the manager of Plaza Pasadena;

(e) Approaching, grabbing, holding, or in any other way impeding any other persons moving through the Plaza Pasadena;

(f) Yelling, using foul or abusive language, or in any other way causing a disturbance while on the premises;

(g) Preventing or hindering business from being conducted in the Plaza Pasadena; and

(h) In any other way, impeding, disturbing, or interfering with the commercial activity of Plaza Pasadena, its owners, tenants, patrons, or other occupants.

IT IS FURTHER ORDERED that time is shortened for purposes of service of the Ex Parte Application, this Order, the Memorandum of Points and Authorities and the Summons and Complaint in this matter pursuant to Code of Civil Procedure Section 1005 so that service of the Ex Parte Application, this Order, the Memorandum of Points and Authorities, and the Summons and Complaint by way of personal service no later than December ____, 1985 at 5:00 p.m. is adjudged to be sufficient notice of the proceedings mentioned therein.

IT IS FURTHER ORDERED that pending such a hearing on the Order to Show Cause, said defendants, their officers, agents, representatives, and employees, and all persons acting in concert with them, are enjoined and restrained from entering, occupying, or using any portion of Plaza Pasadena for the purpose of carrying on any activities connected with, on behalf, or related to Citizens for Representative Government, students petitioning the government to provide aid to the Contras, or any other political cause until and unless each individual, organization, or entity shall have applied to and been authorized and approved by the manager of Plaza Pasadena to conduct such activities and such activities are conducted in accordance with the Rules for Political Petitioning attached hereto as Exhibit "A"; and

From performing any of the following acts on any portion of Plaza Pasadena on behalf of, or related to, Citizens for Representative Government or students

petitioning the government to provide aid to the Contras or any other politically related group:

(a) Distributing any pamphlets, literature, flyers, bumper strips, or other paraphernalia;

(b) Soliciting signatures of any persons, except from a location designated by plaintiffs and only on the days and during the hours that the mall is open to the public as specifically approved by the Manager of Plaza Pasadena;

(c) Soliciting money from any persons;

(d) Using any form or furniture, equipment, displays, posters, or plaques, unless prior approval therefor has been obtained from the manager of Plaza Pasadena;

(e) Approaching, grabbing, holding, or in any other way impeding any other persons moving through the Plaza Pasadena;

(f) Yelling, using foul or abusive language, or in any other way causing a disturbance while on the premises;

(g) Preventing or hindering business from being conducted in the Plaza Pasadena; and

(h) In any other way, impeding, disturbing, or interfering with the commercial activity of Plaza Pasadena, its owners, tenants, patrons, or other occupants.

Dated this ___ day of December, 1985.

JACK [illegible]

COMMISSIONER/JUDGE OF THE
SUPERIOR COURT

APPENDIX E

Preliminary Injunction by Trial Court

BALL, HUNT, HART, BROWN, AND BAERWITZ
211 EAST OCEAN BOULEVARD
P.O. BOX 1287
LONG BEACH, CALIFORNIA 90801
(213) 435-5631
Attorneys for Plaintiffs and Cross-Defendants

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

H-CHH ASSOCIATES, a California limited partnership, doing business as PLAZA PASADENA, and HAHN PROPERTY MANAGEMENT CORPORATION, a California Corporation,	)	**CASE NO. C 580 408**
	)	**PRELIMINARY INJUNCTION**
Plaintiffs,	)	
vs.	)	
CITIZENS FOR REPRESENTATIVE GOVERNMENT, an unincorporated association, dba PASADENA	)	**DATE: January 10, 1986 TIME: 9:00 A.M. DEPT: 86**

CITIZENS FOR REPRESENTATIVE GOVERNMENT, DALE L. GRONEMEIER, JOHN HINRICHS, OZRO ANDERSON, CHRIS SUTTON, JANE POE, JOHN ROE, AND DOES I through 1,000, inclusive,	)
Defendants,	)
AND RELATED CROSS-ACTION	)

The application of Plaintiff for preliminary injunction made herewith came on regularly for hearing before the court on January 10, 1986, pursuant to an order to show cause issued by the court on December 23, 1985. Plaintiffs appeared by counsel, Ball, Hunt, Hart, Brown and Baerwitz, and Thomas J. Leanse; Defendants appeared by counsel, Gronemeier, Barker & Huerta, by Dale L. Gronemeier and Christopher Sutton.

Upon proof made to the satisfaction of the court, and good cause appearing therefore, as reflected in the court's statement of decision dated January 13, 1986,

IT IS ORDERED that during the pendency of this action, Defendant Citizens For Representative Government, an unincorporated association, its officers,

members, employees, and agents, and the individual defendants, Dale L. Gronemeier, Ozro Anderson, and Chris Sutton, their agents, servants, and all persons acting in concert with any or all of the foregoing defendants shall and hereby are enjoined and restrained from:

1. Engaging in any political activity on the premises of Plaza Pasadena, Pasadena, California, including but not limited to parking areas physically connected therewith until said defendants have caused to be submitted to plaintiff an application or registration form and have received approval by plaintiff for such activity;

2. Violating, or failing to comply with the rules and regulations adopted by plaintiffs, except that such rules and regulations may not:

(a) Regulate the political content of any sign, poster, or display, except as to the size of the sign, poster, or display;

(b) Prohibit solicitation of political contributions at the location designated for the political activity, provided, however, plaintiff may prescribe a reasonable radius surrounding the table beyond which defendants may not approach persons for contributions.

(c) Prohibit defendants from approaching persons within a reasonable radius of the table where the political activity is permitted, so long as defendants do not physically impede such persons.

IT IS FURTHER ORDERED that, before the foregoing order shall take effect, plaintiff herein shall file a written undertaking in the sum of $10,000.00, as required by Section 529 of Code of Civil Procedure, for the purpose of indemnifying defendants for such

damages as they may sustain by reason of this preliminary injunction if the court finally decides that plaintiff is not entitled thereto;

IT IS FURTHER ORDERED that the preliminary injunction as set forth above, shall issue upon plaintiff's filing a written undertaking of the sum specified above.

The court reserves jurisdiction to modify or dissolve the preliminary injunction for good cause shown.

Dated this 17 day of January, 1986.

WARREN H. DEERING
Judge of the Superior Court

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

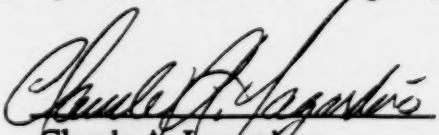
I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Los Angeles, California 90025; that on January 26, 1988, I served the within *Petition for Writ of Certiorari* in re: "H-CHH Associates et al. vs. Citizens for Representative Government et al.," by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original + 40 Copies)

Dale L. Gronemeier
Gronemeier, Barker & Huerta
199 South Los Robles
Suite 810
Pasadena, CA 91101
(3 Copies)

Allen B. Grodsky
ACLU Foundation of
Southern California
633 South Shatto Place
Los Angeles, CA 90005
(1 Copy)

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 26, 1988, at Los Angeles, California.



Claude A. Lagardere
(Original signed)

No. 87-1276

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

H-CHH ASSOCIATES, a California limited partnership, doing business as PLAZA PASADENA, and HAHN PROPERTY MANAGEMENT CORPORATION, a California corporation
Petitioners,

v.

CITIZENS FOR REPRESENTATIVE GOVERNMENT, doing business as PASADENA CITIZENS FOR REPRESENTATIVE GOVERNMENT, DALE L. GRONEMEIER, CHRISTOPHER A. SUTTON, and OZRO ANDERSON,
Respondents.

On Petition For A Writ Of Certiorari To The California Court of Appeal, Second District, Division One

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DALE L. GRONEMEIER*
BRENDA J. PENNEY
CHRISTOPER A. SUTTON
ELBIE J. HICKAMBOTTOM, JR.
Gronemeier, Barker & Huerta
199 S. Los Robles, Suite 810
Pasadena, California 91101
(818) 796-4086/(213) 681-0702
Counsel for Respondents
**Counsel of Record*

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTION PRESENTED

The petitioners herein are owners and lessors of a mall in Pasadena, California, which is heavily subsidized by the taxpayers of Pasadena. Their petition has been brought to this Court at a preliminary stage in the litigation below without a full factual record upon which this Court could base a decision. Nevertheless, the question sought to be presented by petitioners is whether the least restrictive means test should apply to them in this instance.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Miscellaneous

STATUTES INVOLVED

United States Constitution, Amendment V, which provides:

No person shall . . . be deprived on life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment XIV, which provides:

No State shall . . . deprive any person of life, liberty, or property, without due process of law;

California Constitution, Article One, Section Two, which provides:

Every person may freely speak, write, and publish his or her sentiments on all subjects, being responsible for the abuse of his right. A law may not restrain or abridge liberty of speech or press.

California Constitution, Article One, Section Three, which provides:

The people have the right to instruct their representatives, petition government for redress of grievances, and

assemble freely to consult for the common good.

STATEMENT OF THE CASE

Respondents Pasadena Citizens for Representative Government (the "Citizens") is broad-based, non-partisan organization of Pasadena taxpayers. At the time this action was filed, the Citizens were circulating an initiative petition to have a mayor city attorney, city clerk, and city controller elected at-large in the City of Pasadena. The Citizens sought to gain approximately 5,600 valid signatures by January 20, 1986, in order to qualify the initiative for the following June, 1986, election.

Petitioners H-CHH Associates, doing business as Hahn Property Management Corporation ("Hahn") are the owners and lessors of the Plaza Pasadena Shopping Center (the "Plaza") located in the City of Pasadena. The Plaza is a two-story enclosed structure with an interior court which runs the length of the mall. The

Plaza has been heavily subsidized by the taxpayers of the City of Pasadena, including, inter alia, taxpayer-funded construction of the parking which is essential to the Plaza's operation.

On December 19, 1985, the Citizens' attorneys attempted to apply for permission to seek signature for their initiative petitions and solicit contributions in the Plaza from 5:00 p.m. to 7:00 p.m. on December 23, 1985. The Plaza's manager gave the Citizens' attorneys an application form and written "Rules for Political Petitioning on Shopping Center Property" (the "Rules"). However, the manager refused to process the Citizens' application. The basis for that refusal was a purportedly-recently adopted, unwritten and personal rule that there could be no political activity in the Plaza during the holiday season.

When the Citizens indicated they believed the absolute ban on political activity was constitutionally impermissible, Hahn sought and obtained a temporary restraining order on December

23, 1985. The trial court at that time acknowledged that there was no evidence that political petitioning by the Citizens would disrupt holiday activities at the Plaza. Nevertheless, the trial court stated that private shopping centers have a right to adopt regulations concerning free speech and petition activity and therefore granted the requested injunction.

Subsequent to the granting of the temporary restraining order, the Citizens applied for permission to petition at the Plaza, following the holiday season, and indicated a willingness to cooperate with Hahn to ensure that their free speech activities would not disrupt the normal business operations of the Plaza. Nevertheless, the Citizens remained unable to engage in such political activity because Hahn insisted upon enforcing its overbroad rules, as well as various other impermissible unwritten limitations.

The trial court entered a preliminary injunction restraining the

Citizens (along with its "officers, members, employees, and agents"), the individual defendants (and their agents and servants), and all persons acting in concert with them, from engaging in "any political activity" at the Plaza, unless an application from permitting the activity has been approved in advance by same. The trial court attempted its own ad-hoc fixing of the Plaza's rules to conform to the requirements of the California Constitution. The trial court thus enjoined the Citizens from engaging in "political activities" unless they fully complied with the Plaza's Rules, save for three exceptions: that the Citizens could solicit contributions and could approach persons in the Plaza for signatures or contributions, and that the Plaza could not regulate the "political content" of any sign, poster, or display.

On appeal, the Citizens requested that the Court of Appeal set aside the trial court's temporary restraining order and preliminary injunction as impermissible restraints on free speech

and petition rights under the free speech petition provisions of the California Constitution. In its decision (Petition for Writ of Certiorari, Appendix pp. A16 et seq), the Court of Appeal carefully considered and evaluated separately the reasonableness of each of the Rules under the California Constitution. In fact, with respect to each rule, the Court of Appeal not only explained why it considered it to be unreasonable but has also suggested an alternative rule which it believes accomplishes the same business purpose.

Specifically, the Court of Appeal decision allows for a registration process for political petitioning, requiring applicants to give the name and address of the individual or group seeking to engage in expressive activity; the name and "identification" number of the person "in charge"; the "nature" of the political petition for which signatures are sought; the date and time applicants wish to engage in petitioning activity; whether written literature will

be distributed; the names of persons who will participate and a telephone number for contact. The decision simply does not allow the Plaza to have unwritten, subjective and unfettered discretion as to whether an application will be accepted.

The decision also upheld the Plaza's registration fee and allowed management reasonable discretion to designate areas for free speech activities and to choose the number of petitioners and the time for petitioning as long as there are objective written criteria. Similarly, the decision allows for management approval of the furniture, signs, mechanical equipment and musical instruments used by petitioners as long as the decision is based on written and objective criteria.

The decision, for the most part, strikes a reasonable and balance between constitutional rights and economic interests. If anything, the decision is too deferential to the economic interests of the Plaza and insufficiently

protective of citizens' constitutional rights. The Court of Appeal upheld the Plaza's prohibition against any political activity during the Christmas holiday and upheld the absolute prohibition against solicitation of contributions. The Court of Appeal did this despite little or no evidence to show that these prohibitions actually protected legitimate business interests of the Plaza.

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioners have asserted that the question presented by their appeal is as follows:

"Whether application of the 'least restrictive means' standard to time, place and manner rules promulgated in good faith by the management of a privately-owned shopping center results in a taking without just compensation in violation of the private property owners' rights under the Fifth and Fourteenth Amendments?" [emphasis added]

The question presented by petitioners is misleading because the

Plaza is not a pure private shopping center but rather is a quasi-public situs. Furthermore, petitioners seek to have this Court grant plenary review of the Court of Appeal's decision which reversed the trial court's granting of a temporary restraining order and preliminary injunction. This Court's practice, however, is not to review cases prior to a final decree, "except in extraordinary cases." Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916).

A. The Plaza's Tax-Supported Status Makes It A Quasi-Public Entity Rather Than A Purely Private Shopping Center Consequently, This Is Not The Appropriate Case To Reconsider Pruneyard.

In its petition for a writ of certiorari, the Plaza has attempted to resurrect the same red herring it put before the trial court and the Court of Appeal. The Plaza argues that the traditional constitutional protections afforded free speech and free petition rights are not applicable to it because

it is not a quasi-governmental entity but rather strictly privately-owned. However, the well-documented interdependence of the Plaza with the City of Pasadena warrants the conclusion that the City is a joint participant in the promulgation of the Plaza's overly restrictive rules -- which make this an inappropriate case to consider the continuing viability of Robin v. Pruneyard Shopping Center, 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (1979), aff'd sub nom, Pruneyard Shopping Center v. Robins, 447 U.S. 74, 64 L.Ed. 2d 741 (1980) ("Pruneyard").

It would clearly be inappropriate to reconsider the Pruneyard decision based upon the facts of this case. Unlike the mall in Pruneyard and the line of cases which precede it, this case does not involve a mall which acquired its public status solely from the manner in which it was used by the public. Instead, the tax-supported status of the Plaza makes it a quasi-public entity regardless of how the public uses its facilities.

The interconnectedness between the Plaza and the City of Pasadena was noted in the Court of Appeal decision (Petition for writ of Certiorari, Appendix pp A15-A16) as follows:

"The appropriateness of applying the traditional analysis of time, place and manner regulations to the instant matter is reinforced by the distinction between the Plaza and the privately-owned "quasi-public" forums identified in Hoffman, Diamond I and Robins. In each of those cases,the facility and the land upon which it stood were wholly owned by private enterprises which acquired their "quasi-public" status solely from the manner in which the facilities were used. In contrast, the Plaza does not own the land upon which it stands or the three underground parking garages which accommodate its customers. The city exercised its powers of eminent domain to permit the development of the Plaza and financed construction of the parking facilities through its redevelopment agency; the Plaza pays rental fees for

the use of the parking facilities.

The integrated nature of the publicly-owned land and parking structures and the privately-owned Plaza has been commented upon previously. (See Graydon v. Pasadena Redevelopment Agency (1980) 104 Cal. App. 3d 631, 634-635.) When a public entity so far insinuates itself into a position of interdependence with the private enterprise, the public entity becomes a joint participant in challenged activity. (Burton v. Wilmington Pkg. Auth. (1961) 365 U.S. 715, 725.) In these circumstances, it is clear the constitutionality of plaintiffs' regulations must be assessed by "a balancing of interest and a determination that [the party] has used the 'least restrictive means' to regulate the conduct in question." Spiritual Psychic Science Church v. City of Azusa (1985) 39 Cal. 3d 501, 517.)"

The single largest components of the Plaza are three publicly-financed parking garages located directly under and on either side of it. The ground under the

Plaza is owned by the Pasadena Community Development Commission (hereinafter "PCDC""), a redevelopment agency as defined by the California Community Redevelopment Law (Health and Safety §33000 et seq.). The Plaza pays rental under a lease from the PCDC to use the three publicly-owned parking facilities physically attached to it. Additional property tax revenues help to pay the ongoing debt for the parking structures. The Plaza is located on a block south of Pasadena City Hall, and it is interposed in location amidst the Pasadena Civic Center. City Hall is one block north and the Pasadena Conference Center and Civic Auditorium are adjacent to the south of the Plaza.

The peculiarly interconnected nature of the Plaza with the public parking garages is a central adjudicated fact in Graydon v. Pasadena Redevelopment Agency, 104 Cal. App. 3d 631, 164 Cal. Rptr. 56 (1980), cert. den., 449 U.S. 983 As a party to that action, the Plaza (Ernest W. Hahn, Inc.) is collaterally estopped

concerning the factual findings therein. In Graydon, the plaintiff challenged the lack of public bidding for the construction contracts for the Plaza's parking garages. The Plaza and the Pasadena Redevelopment Agency (predecessor to the current PCDC) proved the peculiar interconnected nature of the public parking garages and the Plaza; the Court held, based in part on such proof, that no competitive bidding was required. The case determined, inter alia, the following facts:

"To finance the public cost of the retail shopping center development for acquisition of land, demolition of buildings, relocation of residents and businesses, and construction of required parking facilities comprised of a subterranean garage beneath the shopping center and two above ground parking structures, the Agency sold tax allocation bonds in the principal amount of approximately $58 million." Graydon, supra 104 Cal. App. 3d at 634 [emphasis added].

"The respondents' [including Ernest W. Hahn, Inc.] answers alleged that competitive bidding was not required in this case for the construction of the subterranean garage because of the integrated nature of that garage and the major retail center; that the purposes of competitive bidding would not be accomplished and because construction of that garage without competitive bidding would be advantageous and in the public interest." Graydon, supra, 104 Cal. App. 3d at 635 [emphasis added].

"The negotiated contract for the constitution of the subterranean garage is an integral part of the whole method of financing the public costs associated with the retail center. The financing is by bonds issued by the Agency to be paid from tax increments allocated to the Agency.

. . .

The ability of the Agency to pay its bonds, dependent in large part upon the flow of tax increment monies resulting from the completion of the retail center,

was thus directly linked to the award of the questioned contract." Graydon, supra, 104 Cal. App. 3d at 645 [emphasis added].

In its construction, financing and operation, the Plaza is a joint participant with the government and thus cannot deny its governmental responsibilities. The Plaza should not be allowed to enjoy the benefits of its relationship with the City of Pasadena (e.g. avoiding competitive bidding), without accepting the responsibility it has to make reasonable accommodations for free speech activity.

The question of "private" versus "state" action is clearly a spurious issue. The Plaza, due to its peculiar interconnectedness with public financing and facilities, is an extension of the government. Its denial of free speech and petition rights is, in effect, a governmentally-sponsored suppression of constitutional rights. Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L. Ed. 2d 45 (1961)

held racial discrimination in the context of state subsidized commercial activity was state action. It is state action despite the private business' total control and management of its commercial establishment. In Burton, Justice Tom Clark wrote for the Court:

"[It] cannot be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits . . . [Neither] can it be ignored, especially in view of Eagle's affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but are indispensable elements in, the financial success of a governmental agency.

. . .

. . . [I]n its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the 14th Amendment imposed upon the private enterprise as a

consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied by equal protection of the laws that it was done in good faith. . . .[B]y its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service,but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the 14th Amendment." Burton, supra, 365 U.S. at p. 725 [emphasis added]

Constitutional rights of expression are of equal dignity with equal protection. There is no distinguishing

feature between governmental conduct that racially discriminates and governmental conduct that suppresses free speech. The Plaza's refusal to allow free speech is equivalent to a refusal to admit persons who happen to be black, Jewish, or female. Such unconstitutional actions must be condemned.

As the decision of the Court of Appeal noted, the interdependence of the Plaza and the City of Pasadena makes them joint participants in the challenged activity -- the promulgation of the Plaza's rules. This conclusion is not contradicted, as the petition herein spuriously argues, because the Plaza may have the rights to the air space above the garage.

B. The Posture Of This Case Makes It Premature And Inappropriate For Plenary Review.

Petitioners seek to have this Court grant plenary review of the Court of Appeal's decision setting aside the trial court's issuance of a preliminary injunction. This Court's practice,

however, is not to review cases prior to a final decree, "except in extraordinary cases". Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). The posture of this case demonstrates the wisdom of avoiding plenary review prior to the development of a full factual record and consideration of the legal arguments by the courts below in the first instance.

The litigation herein arose from an attempt by the Citizens to apply for the right to exercise their free speech and petition rights as guaranteed by Pruneyard. When the Citizens sought to gather signatures for their petition at the Plaza, it refused to even accept a registration form on the claim that the Plaza had an unwritten rule that there could be no political activity in the Plaza "during the holiday season." The Plaza continued subsequent after the holiday season to restrict political speech and petitioning by insisting on enforcing its "Rules for Political Petitioning on Shopping Center Property"

(the "Rules"). Although there was never any attempt to conduct speech and petition activity without the Mall's permission, the Plaza sued the Citizens to compel them to obey its rules. The Citizens counter-sued, asserting the Plaza's rules were constitutionally defective because they involved a prohibition on non-petitioning activity, a limitation to adults, unwarranted imposition of liability an improper deposit requirement, overly-broad time, place and manner restrictions, restraints on content of speech and solicitation of contributions, restrictions on approaching voters and a power to require insurance. The Citizens also brought suit against the City of Pasadena, based upon the City's legal status as a joint participant in the constitutionally impermissible rules promulgated by the Plaza. Immediately upon the filing of its complaint against the Citizens, Hahn sought, and was granted, preliminary injunctive relief by the trial court. The Court of Appeal decision concerns the

propriety of that interim relief.

Thus, the Court of Appeal's decision did not reach many of the merits of the substantive claims in the actions herein. This case is now before the Court without the benefit of the substantial further discovery which will occur prior to trial, and thus the issues raised by petitioners are not presented with the "clarity, precision and certainty" that would be provided by a fuller record. Rescue Army v. Municipal Court, 331 U.S. 549, 576 (1947); Accord, Socialist Labor Party v. Gilligan, 406 U.S. 583, 588, n.2 (1972). In fact, cross-defendant City of Pasadena has yet to respond to the cross-complaint in this action (operating under an agreement with the Citizens for an open extension of the time to respond to their cross-complaint, pending final resolution of the appeal herein).

Petitioners have asked the Court to reconsider the entire line of cases which precede and follow the Pruneyard decision. However, they have asked the Court to do this without a complete

factual record. The Pruneyard line of cases are, to a large extent, based upon judicial notice of facts which characterize modern shopping centers. The Court should not set aside Pruneyard and its progeny based upon petitioners self-serving supposition that those essential facts have changed.

C. Pruneyard Should Not be Reconsidered

Even assuming arguendo that the Plaza was a purely private shopping center, the petitioners have not established a sufficient basis for the reconsideration of Pruneyard. In Pruneyard, this Court, by Mr. Justice Rehnquist, held that state constitutional provisions which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which the public is invited did not violate the shopping center owner's rights under the Fifth and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments. As this Court noted in

Pruneyard, supra, 447 U.S. at p. 2041.

"...[I]t is well established that 'not every destruction or injury to property by governmental action has been held to be a 'taking' in the constitutional sense.' Armstrong v. United States, 364 U.S. 40, 48, 80 S. Ct. 1563, 1568, 4 L.Ed.2d 1554 (1960). Rather, the determination whether a state law unlawfully infringes a landowner's property in violation of the Taking Clause requires an examination of whether the restriction on private property "force[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Id., at 49, 80 S.Ct., at 1569. This examination entails inquiry into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. Kaiser Aetna v. United States, supra, at 175, 100 S.Ct., at 390. When "regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon,

260 U.S. 393, 415, 43 S.Ct. 158, 160, 67 L.Ed. 322 (1922).

Here the requirement that appellants permit appellees to exercise state-protected rights of free expression and petition on shopping center property clearly does not amount to an unconstitutional infringement of appellants' property rights under the Taking Clause. There is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center. The Pruneyard is a large commercial complex that covers several city blocks, contains numerous separate business establishments, and is open to the public at large."

As was the case in Pruneyard, there is nothing in the instant case to suggest that the value or use of petitioners' property has been impaired by the Court of Appeal decision. Furthermore, there is clearly an insufficient factual record below for the Court to make an

examination into such factors as the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations as required by Pruneyard. Thus, given the lack of a full factual record in the litigation below, the Court should not use this petition to reconsider Pruneyard, even if the Plaza were a purely private shopping center, which it is not.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be denied.

DATED: February 26, 1988

Respectfully submitted,

GRONEMEIER, BARKER & HUERTA
Dale L. Gronemeier*
Brenda J. Penny
Christopher A. Sutton
Elbie J. Hickambottom, Jr.
Attorneys for Respondents

*Counsel of Record

(3)

No. 87-1276

In The
Supreme Court of the United States
October Term, 1987

H-CHH ASSOCIATES, a California limited partnership, doing business as PLAZA PASADENA, and HAHN PROPERTY MANAGEMENT CORPORATION, a California corporation,
Petitioners,

v.

CITIZENS FOR REPRESENTATIVE GOVERNMENT, an unincorporated association, doing business as PASADENA CITIZENS FOR REPRESENTATIVE GOVERNMENT, DALE L. GRONEMEIER, CHRISTOPHER A. SUTTON, and OZRO ANDERSON,
Respondents.

On Writ of Certiorari to the California Court of Appeal, Second Appellate District

MOTION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

RONALD A. ZUMBRUN
*ANTHONY T. CASO
EILEEN J. MOORE
*COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Amicus Curiae, Pacific Legal Foundation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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On Writ of Certiorari to the California Court of Appeal, Second Appellate District

MOTION OF PACIFIC LEGAL FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 36, Pacific Legal Foundation respectfully moves the Court for leave to file the annexed brief in support of the petition for writ of certiorari. Counsel for petitioners has consented to the filing of this brief and notice of such consent has been lodged with the clerk of the Court. Counsel for respondents has refused consent, and notice of such refusal also has been lodged with the clerk of the Court.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt public interest organization with over 19,000 contributors and supporters located throughout the country. PLF's principal office is located in Sacramento, California. PLF also maintains a litigation office in Anchorage, Alaska, and a liaison office in Seattle, Washington. Since its establishment in 1973, PLF has actively engaged in research and litigation concerning a broad spectrum of public interest issues. PLF advocates, in policy and practice, the protection of persons' constitutional rights, including property rights, against excessive or illegal intrusion.

The issue in this case is whether California can force a private shopping center owner to allow all political or ideological advocates to use the owner's private property to circulate leaflets or gather petition signatures while preventing the owner from imposing reasonable regulations on the activity. Amicus submits that to do so would violate the owner's First, Fifth, and Fourteenth Amendment rights under the United States Constitution.

In *Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980), this Court accepted the California Supreme Court's

interpretation of the California Constitution to guarantee the affirmative right to intrude on the purely private property of a shopping mall in order to exercise free speech. This Court and the California Supreme Court, however, allowed the ideologues' desires to displace the property owner's rights on the condition that the property owner could protect his or her interests by imposing reasonable regulations on such use of the private property.

The opinion in the case at bar drastically extends *Pruneyard* by eviscerating the property owner's ability to impose reasonable regulations on the use of his or her property by persons who are not there to shop but to espouse their own ideological agenda. The court now requires the regulations to meet the "compelling interest" and "content-neutral, least restrictive means" test (193 Cal. App. 3d 1193, 1207-09, 238 Cal. Rptr. 841 (1987)) normally reserved for measuring the constitutionality of *state* action when restricting speech in quintessential public forums. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983). This unwarranted expansion of *Pruneyard* goes far beyond merely interpreting California's free speech clause more broadly than that of the United States Constitution; it strikes the fatal blow to the private property owner's own First, Fifth, and Fourteenth Amendment rights under the United States Constitution.

This decision significantly affects not only all citizens of the State of California, a number of whom are PLF contributors and supporters, but it may serve as a guide to other state jurisdictions. PLF respectfully requests this Court to grant this motion for leave to file the annexed

amicus curiae brief in support of the petition for writ of certiorari.

DATED: February —, 1988.

Respectfully submitted,

RONALD A. ZUMBRUN
*ANTHONY T. CASO
EILEEN J. MOORE
*COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

By: _____
ANTHONY T. CASO

Attorneys for Amicus Curiae,
Pacific Legal Foundation

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On Writ of Certiorari to the California Court of Appeal, Second Appellate District

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

The interest of amicus is set out in the preceding motion for leave to file this brief.

DECISION BELOW

The opinion of the California Court of Appeal, Second District, is reported at 193 Cal. App. 3d 1193, 238 Cal. Rptr. 841 (1987).

SUMMARY OF ARGUMENT

In *Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980), this Court accepted the California Supreme Court's interpretation of the California Constitution to allow intrusion onto the private property of a shopping mall for political petitioning or leafleting as long as the property owner could impose reasonable restrictions on the activity.

In the case at bar, however, the California Court of Appeal struck down the shopping center's reasonable regulations on their face because they did not meet the "content-neutral, least restrictive means" test traditionally reserved for measuring state action restricting speech in quintessential public forums. In thus applying the wrong constitutional standard, equating property owners with governmental entities, the court drastically extended *Pruneyard* and violated the property owners' First, Fifth and Fourteenth Amendment rights. Property owners are now forced to subsidize all ideological activities regardless of their own interests and beliefs. Moreover, the court has taken the property owners' right to reasonably exclude from their property those who seek to use it not for the purpose for which the owner has invited the public but to advance their own ideological agenda.

ARGUMENT

I

BY EQUATING A PRIVATE PROPERTY OWNER WITH A GOVERNMENTAL ENTITY, THE CALIFORNIA COURT VIOLATES THE PROPERTY OWNER'S FIRST AMENDMENT RIGHTS

In striking down the property owner's regulations, the court below held that one regulation was "fatally flawed" because it allowed the shopping center owner discretion to decide whether the intrusive political activity would "adversely affect the shopping center environment, atmosphere or image." It stated that such a regulation was not reasonable because it was not content-neutral and did not provide "definite, objective guidelines" as to how that discretion was to be exercised. *H-CHH Associates v. Citizens for Representative Government,* 193 Cal. App. 3d at 1211. Importantly, however, as applied to these respondents, the court recognized that the regulations were applied reasonably. The court below *upheld* the shopping center's original refusal to allow political petitioning during the Christmas holiday. 193 Cal. App. 3d at 1220. Moreover, the property owners thereafter granted respondents permission to petition at the shopping center on January 2. 193 Cal. App. 3d at 1204.

The court nonetheless struck down the property owner's regulations *on their face,* erroneously measuring the regulations by a standard traditionally reserved for state action and "quintessential public forums." *See Perry Education Association v. Perry Local Educators' Association,* 460 U.S. 37, 45 (1983). The court below stated:

> "[L]ike any other time, place and manner regulations, those of a shopping center are constitutionally reasonable only if they are narrowly drawn and limited to the end of promoting specifically identified substantial interests.
>
> . . . .
>
> ". . . [I]t is clear the constitutionality of plaintiffs' regulations must be assessed by 'a balancing of interest and a determination that [the party] has used the "least restrictive means" to regulate the conduct in question.' " 193 Cal. App. 3d at 1208-09.

Even cases involving *public* properties that are not traditional public forums are subject to a lower standard of review (the reasonable regulation standard) than the court applied here. *Perry*, 460 U.S. at 46.

The court below thus applied an erroneous constitutional analysis to the regulations in this case. A private property owner is not a governmental entity. Unlike the government, a private person need not subsidize, and cannot be compelled to donate his property to ideological activity. *Abood v. Detroit Board of Education*, 431 U.S. 209, 234-35 (1977). He is entitled under the First Amendment to support and oppose, publicly or privately, ideological activities of *any* sort. He may refrain from supporting causes and activities for any reason, be it because he is morally opposed or because he reasonably believes the activities imperil the uses and purposes for which he has invited the public onto his property.

In treating the shopping center owner like a governmental entity, the California court has elevated the state free speech interests of soapbox orators above the First Amendment interests of the private property owner. By

preventing a private property owner from adopting regulations on political or ideological activity unless they are "content-neutral" and "narrowly" tailored to serve a significant interest," the California court now requires the private property owner to subsidize any and all political, religious, or social action groups by furnishing a convenient place for them to urge their views on the public. This new standard imposed upon private property owners prevents the owner from electing not to subsidize the particular ideological views of any one group. *Pruneyard* does not support this infringement.

The court's converting of the *Pruneyard* "reasonable regulation" standard into the strictest "content-neutral, least restrictive means" standard is erroneous. *Pruneyard* established the "reasonable regulation" standard as a small safeguard to protect what vestige of the property owner's rights remained intact after allowing political activity to override the property owner's rights: "A handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, *under reasonable regulations adopted by defendant* to assure that these activities do not interfere with normal business operations [citation omitted] would not markedly dilute defendant's property rights." *Robins v. Pruneyard Shopping Center,* 23 Cal. 3d 899, 911, 153 Cal. Rptr. 854 (1979) (emphasis added).

On appeal, this Court recognized the importance of the "reasonable regulation" safeguard for the property owner's rights. Justice Rehnquist quoted this very language in his majority opinion. *Pruneyard,* 447 U.S. at 78.

Justice Marshall, concurring, also noted specifically that the "owners are permitted to impose reasonable restrictions on expressive activity." 447 U.S. at 94. Justice White, concurring in part and concurring in the judgment, relied on the fact that "[t]he state court recognized, however, that reasonable time and place limitations could be imposed...." 447 U.S. at 95.

To place the private property owner on the same footing as government and require him to supply a forum for *all* causes without regard to those he reasonably may find objectionable, either for personal, moral, or business reasons, unconstitutionally compels him to subsidize an ideological cause. *Abood, supra.* Amicus urges the Court to grant certiorari in this case to restore the private property owner's First Amendment rights to a status equal to the rights of those who seek to use his property for their own ideological purposes.

II

PREVENTING THE PROPERTY OWNER FROM IMPOSING REASONABLE RESTRICTIONS ON FREE SPEECH ACTIVITIES IS A TAKING OF HIS RIGHT TO EXCLUDE WITHOUT JUST COMPENSATION

The state, by ipse dixit, may not redefine property rights so as to transform private property into public property without compensation. *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 164 (1980). By converting this Court's requirement of "reasonable regulations" into the "neutral, objective, narrowly-drawn, and least restrictive" standard, the California court has done just that. It has robbed the owner of his remaining right

to exclude persons from his property whom he subjectively (and reasonably) believes will disrupt his own and his invitees' use of his property. Whereas *Pruneyard* allowed the owner the reasonable right to exclude, the new standard requires the owner to allow *all* speakers onto his property regardless of their purpose and cause. This conversion of private property into a wide open public forum is a significant interference with the owner's reasonable investment-backed expectations. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

The new standard expressed by the Court of Appeal allows the property invasion to occur at the will of the speaker. Ideological advocacy now must be allowed on an almost permanent and continuous basis. The court did not even allow the property owner to regulate *where* on the private property the political activity would occur. 193 Cal. App. 3d at 1213. The degree of entry and use that the court condones is tantamount to a "permanent physical occupation." *Nollan v. California Coastal Commission*, — U.S. —, 97 L. Ed. 2d 677, 686 (1987). Unless private property owners are allowed reasonable latitude to protect their interests by restricting the entry and use of their property by others, the regular and repeated invasion of the ideological activities approaches the type of occupation that is a taking per se and is invalid under the Fifth and Fourteenth Amendments "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982).

Amicus urges the Court to grant certiorari to redress the violation of this important constitutional right.

CONCLUSION

Private regulations, overtly reasonable to protect the use of the property for its designated purpose, and clearly justified to protect the rights of the owners and their tenants, have been struck down on their face because they did not meet the "content-neutral, least restrictive means" test reserved for state action restricting speech on public sidewalks. Consequently, the private property owner is now required to donate his property to all political and ideological activities without concern for his own or his tenants' interests and rights. This transformation of private property into a wide open public forum violates the property owner's First, Fifth, and Fourteenth Amendment rights and elevates the speakers' state constitutional rights above those federal constitutional rights of the property owner in violation of the Supremacy Clause. Amicus respectfully urges this Court to grant certiorari to restore the property owners' constitutional rights.

DATED: February, 1988.

Respectfully submitted,

RONALD A. ZUMBRUN
*ANTHONY T. CASO
EILEEN J. MOORE
*COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Amicus Curiae,
Pacific Legal Foundation

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Petitioners,

vs.

CITIZENS FOR REPRESENTATIVE GOVERNMENT, doing business as PASADENA CITIZENS FOR REPRESENTATIVE GOVERNMENT, DALE L. GRONEMEIER, CHRISTOPHER A. SUTTON, and OZRO ANDERSON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND DISTRICT, DIVISION ONE

Motion for Leave to File Brief *Amici Curiae* and Brief of the International Council of Shopping Centers, Inc., and California Business Properties Association as *Amici Curiae*, in Support of the Petitioners

EDWARD J. SACK
665 Fifth Avenue
New York, NY 10022
(212) 421-8181
Counsel for the International Council of Shopping Centers, Inc.

JOANNE M. BERNHARD
827 J Street
Sacramento, California 95814
(916) 442-4908
Counsel for California Business Properties Association

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Motion of International Council of Shopping Centers, Inc., and California Business Properties Association for Leave to File Brief *Amici Curiae*

Pursuant to Rule 42(3) of the Rules of this Court, International Council of Shopping Centers, Inc. (ICSC), and California Business Properties Association (CBPA) respectfully move the Court for leave to file a brief *amici curiae* in the above entitled case. Counsel for petitioners has granted its consent and its letter of consent has been filed with the Office of the Clerk of this Court. Counsel for respondents has not replied to movant's letter requesting consent.

ICSC and CBPA are trade organizations representing shopping center owners, developers, retailers, investors, property managers, and all others having a professional or business interest in the shopping center industry not only in California, but throughout the country. The members of these organizations are concerned with the diminution of private property rights. The issues presented in the above

entitled case bear a direct relationship to that concern. Public access to shopping center property, for purposes other than its intended use, continues to be argued and litigated and the ruling of this case creates additional burdens to *all* members of the shopping center industry and to its customers and patrons.

ICSC and CBPA each serve as a clearinghouse for information in the areas of shopping center development and operation which information will be relevant to the disposition of this case and will provide this Court with the overall shopping center industry perspective rather than just one particular instance.

For the foregoing reasons of interest, resulting impact, relevancy, and additional available information, ICSC and CBPA respectfully move that this Court grant leave to file a brief *amici curiae,* which brief is included herein.

DATED: February 25, 1988

Respectfully submitted,

EDWARD J. SACK
665 Fifth Avenue
New York, NY 10022
(212) 421-8181
Counsel for the International Council of Shopping Centers, Inc.

JOANNE M. BERNHARD
827 J Street
Sacramento, California 95814
(916) 442-4908
Counsel for California Business Properties Association

Attorneys for Amici Curiae

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Brief of the International Council of Shopping Centers, Inc., and California Business Properties Association as *Amici Curiae*, in Support of the Petitioners

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Interest of the *Amici Curiae*

The International Council of Shopping Centers, Inc. (ICSC), is the trade association of the shopping center industry. Members of the ICSC, consisting of shopping center developers, retailers, investors, managers and all others having a professional or business interest in the shopping center industry, are engaged in the day-to-day activities of designing, planning, constructing, managing, financing, developing, leasing and owning shopping centers and their retail stores. ICSC has approximately 24,000 members, representing a large majority of the over 28,500 shopping centers in the United States. ICSC has over 4,000 members in the state of California, representing most of the 3,320 shopping centers in California, many of which are directly affected by the decision below.

The California Business Properties Association (CBPA) represents in excess of 4,000 members, all in California, many of whom are involved with shopping centers as developers, retailers, investors, etc., as described above for ICSC. Many of CBPA's members own or operate shopping centers directly affected by the decision below.

Facts

ICSC and CBPA refer the Court to the Brief of the Petitioners for a statement of the facts of this case, and that statement is incorporated herein by reference.

ARGUMENT

POINT I

The issues in this case are of great importance to shopping centers in California and their customers.

After this Court's decision in the *Pruneyard* case,[1] California shopping centers have been struggling to comply with the requirements to allow solicitations for political purposes under reasonable rules and regulations. This has resulted in a great deal of confusion and litigation concerning such matters as the right to conduct a theatrical representation of the war in Central America,[2] whether the Hare Krishna could conduct their customary activities in a shopping center,[3] the radius from a table that solicitors must stay within,[4] and whether petitioners can sell literature.[5] These

[1] *Pruneyard Shopping Center et al. v. Robins et al.*, 447 U.S. 74 (1980).

[2] *Horton Plaza Associates v. Playing for Real Theatre*, 184 Cal. App. 3d 10 (1986), *appeal denied, opinion de-published.*

[3] *Noles et al. v. Northridge Fashion Center, Inc. et al.*, Calif. Ct. of Appeal, 2d Dist., No. 61058 (9/29/82).

[4] *Californians Against Waste Campaign Committee et al. v. H & K Associates, Inc. et al.*, Superior Ct. Sacramento Cty., No. 300294 (12/15/81).

[5] *EMI Santa Rosa Limited Partnership v. Sonoma County Nuclear Freeze Campaign, etc. et al.*, Superior Ct. Sonoma Cty. No. 133547 (6/6/84).

are but a few examples of the many kinds of litigation that have beset malls in California.

The absence of clear guidance is of great importance, not only to shopping center owners and managers, but to the customers of the centers. ICSC estimates that approximately 13 million individuals visit a regional mall in California every month. They come there to shop, and many object to unwanted interference from political solicitors.

The Wisconsin Survey Research Laboratory of the University of Wisconsin conducted a public opinion survey of Wisconsin residents on this issue, sponsored by ICSC. The survey found that 67% of those surveyed believed special interest (political) groups should not be allowed to ask for signatures on petitions in shopping centers. 38% said they would avoid that part of a center where a group (ranging from Boy Scouts to anti- or pro-abortion) was conducting activities; 24% would reduce their shopping time in such an event; and 23% would find another shopping center. This amounts to a substantial interference with the business of a shopping center. Polls in other parts of the country showed similar results. (An extract from the Wisconsin survey is annexed hereto as Appendix A.)

The court below noted the "dearth of authority which provides any form of guidance as to the type of regulation which is valid."[6] The court below then proceeded to develop its own criteria for these regulations. ICSC and CBPA submit that there is a substantial question as to the validity of the "least restrictive means" criterion adopted by the court below. This Court in its *Pruneyard* decision made it clear that its finding of no taking under the Fifth and Fourteenth amendments to the U.S. Constitution was based on the decision of the California Supreme Court allowing restrictions on expressive activity by regulations "that will minimize any interference with [the shopping center's] commercial functions."[7]

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[6] Appendix A to Petitioner's brief, p. A20.

[7] *Pruneyard Shopping Center et al. v. Robins et al., supra,* note 1 at p. 83.

This standard requires a balancing of the California constitutional protections for speech against the shopping center owner's rights to protect its business (and its tenants' businesses) from interference. This Court required an even-handed balancing of these two competing interests. The standard formulated by the court below, however, requiring the least restrictive means, weights the balance in favor of the speech rights. This appears to be inconsistent with the standard approved by this Court in *Pruneyard* which requires, at the minimum, an even-handed balance.

If there is any bias, it would appear to be in favor of the shopping center by the use of the word "minimize" to describe the permissible interference with commercial functions. If the court had said "reasonable interference" or "acceptable interference," that would imply an even balancing. The use of the term "minimum interference" indicates that any weighting of the balance should be in favor of the shopping center because of the unusual intrusion into its rights by California law. The standard adopted by the court below is directly contrary to the minimum interference concept approved by this Court.

The instant case illustrates the need for Supreme Court review of the applicable criteria for rules and regulations which minimize interference with commercial functions of a shopping center. The court below, in applying its "least restrictive" rule, required objective regulations and eliminated all judgmental factors because they presented a potential for improper, content-related restrictions. The notion that objective rules can be drafted to cover all possible situations is, we submit, an impossible goal. If it could be achieved, the result would be a list of regulations so voluminous and cumbersome as to be difficult to comprehend and apply.

Examples of events which could not have been anticipated but have occurred in shopping centers include a riot protesting a threatened Ku Klux Klan registration drive[8] and an

[8] *Cologne et al. v. Westfarms Associates et al.*, Superior Ct. Hartford-New Britain Dist., No. 274171 (8/13/83), *modified on appeal*, 192 Conn. 48, 469 A.2d 1201 (1984).

"anti-war dance" with a simulated death by nuclear war.[9] These unexpected events resulted in a substantial interference with the business of the shopping center on the days they occurred.

POINT II

The *Pruneyard* case should be reconsidered in light of developments since 1980.

In the eight years since the Supreme Court decided the *Pruneyard* case, litigation has occurred throughout the country on this issue. ICSC and CBPA respectfully submit that this extensive litigation requires reconsideration by the Supreme Court of its original decision.

In *Pruneyard*, this Court said that the State of California could require public access to a shopping center for political petitioning under reasonable rules and regulations without violating the center owner's constitutional rights.[10] Since that decision, this issue has been considered by the highest courts of eight states. Six states specifically rejected the California concept.[11] Two states followed California but only to a limited extent.[12]

The six high state courts which rejected the *Pruneyard* rule basically took the position that the purpose of a constitution is to prescribe the relationship of government to

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[9] *Jacobs v. Major*, 132 Wisc. 2d 82, 407 N.W. 2d 832 (1987).

[10] *Pruneyard Shopping Center et al. v. Robins et al., supra.*

[11] *North Carolina v. Felmet*, 302 N.C. 173, 273 S.E. 2d 708 (1981); *Cologne et al. v. Westfarms Associates et al.*, 192 Conn. 48, 469 A.2d 1201 (1984); *Woodland v. Michigan Citizens Lobby*, 423 Mich. 188, 378 N.W. 2d 337 (1985); *SHAD Alliance et al. v. Smith Haven Mall*, 66 N.Y. 2d 496, 488 N.E. 2d 1211 (1985); *Western Pennsylvania Socialist Workers 1982 Campaign et al. v. Connecticut General Life Insurance Company*, ___ Pa. ___, 515 A. 2d 1331 (1986); *Jacobs v. Major, supra.*

[12] *Alderwood Associates v. Washington Environmental Council*, 96 Wash 2d 230, 635 P. 2d 108 (1981), solicitation of signatures on initiative petitions only; *Batchelder v. Allied Stores International, Inc., et al.* 383 Mass. 83, 445 N.E.2d 590 (1983), solicitation of signatures on nominating petitions only.

the people, not relationships among individuals. California, by permitting its state constitution to be used to allow some individuals to assert rights against others, has adopted an unusual constitutional theory.

Although the facts presented in *Pruneyard* were simply a few students soliciting petitions, this has now mushroomed into a substantial interference with the business of shopping centers. As noted in petitioners' brief, the mere implementation of the rules and regulations prescribed by the court below imposes a substantial burden on a shopping center. It also should be noted that the few students have become many different groups, including some that use paid solicitors to obtain signatures in shopping centers.[13]

Shopping center developers have created valuable properties. By forcing centers to make these properties available to certain groups, for their own purposes unrelated to the business of the center, California has taken property without compensation within the meaning of recent decisions of this Court.[14]

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[13] *Sacramento Union,* August 6, 1984, p. A1-2. (Extract annexed as Appendix B).

[14] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* ___U.S. ___, 107 S.Ct. 2378 (1987); *Nollan v. California Coastal Commission,* ___U.S. ___, 107 S.Ct. 3141 (1987).

CONCLUSION

For these reasons, the petition for certiorari raises substantial questions of federal law which require review by this Court.

Respectfully submitted,

Edward J. Sack
665 Fifth Avenue
New York, NY 10022
(212) 421-8181
Counsel for the International Council of Shopping Centers, Inc.

JoAnne M. Bernhard
827 J Street
Sacramento, California 95814
(916) 442-4908
Counsel for California Business Properties Association

Appendix A

Extract from the Wisconsin Shopping Center Survey

University of Wisconsin-Extension
Wisconsin Survey Research Laboratory March 18, 1985

THE WISCONSIN SHOPPING CENTER SURVEY

Introduction

The data presented in this report were obtained from 956 telephone interviews completed with randomly selected adults throughout the State of Wisconsin during the last two weeks of January, 1985. The research, sponsored by the International Council of Shopping Centers, was carried out by the University of Wisconsin's Survey Research Laboratory.

Section A contains: 1) the actual questions as they were asked during the interviews, 2) percentaged frequency distributions of all coded responses to each question, and 3) general conclusions that may be derived from the statistical findings.

Section B describes in some detail the methodological procedures used in this research, with emphasis on the development of the interview schedule and interviewing requirements. All aspects of the shopping center survey were designed to meet or exceed the highest standards of survey research.

A description of the random digit dialing telephone sample design used in the research, and a final response rate report comprise Section C.

A copy of the interview schedule used in the survey is appended to the report.

SECTION A. BASIC RESULTS AND CONCLUSIONS
The Wisconsin Shopping Center Survey

Statistical Validity and Sampling Error

Given the care exercised in the selection of the sample and high response rate, the number of completed interviews upon which these findings are based represents a statistically valid survey—within known limits of sampling error—of the attitudes and behavior of the adult residents of Wisconsin.

Any sample survey will contain sampling error. While it is certainly true that the smaller the sample size, the larger the sampling error, it is also true that the degree to which error is present in a survey is dependent on many things in addition to sample size. Assuming, however, that the survey is carefully done (as was the Wisconsin shopping center survey), the statistical margin for error for an operation yielding 956 completed interviews is approximately plus or minus 3 percentage points at the .95 level of significance.

For example, this survey found that 44 percent of the respondents believe management should have the right to determine which groups are allowed in the center (question 18). A sampling error of ± 3 percentage points at the .95 level of significance indicates that 95 percent of the time no more than 47 percent and no less than 41 percent of the respondents believe that management should have this right.

The statement that a given relationship reported in the data is "statistically significant" means that it cannot reasonably be attributed to chance variations due to sampling error. Thus, in the above example from question 18, the difference is statistically significant between the percentage of respondents who believe the centers should be open to all (37 percent), and those who feel management should have the right to determine which groups use the centers (44 percent). In this sense, it is statistically "valid" to

conclude that Wisconsin adults are somewhat more likely to support management determination of shopping center use (as measured by question 18) than to favor an open policy for all special interest groups.

Basic Results and Conclusion

As presented below, the exact question asked during the interview is reproduced above the percentaged frequency distribution of responses to that question. The absolute number of cases (i.e., interviews) upon which each distribution is based is given at the bottom of that distribution. All percentages shown here were computed after the removal of "not ascertained" entries and were rounded to the nearest whole number.

Q-1. In this survey, we define a shopping center as a group of stores anchored by a department store, supermarket, or discount store, and providing off-street parking. In a typical *month,* how many times—if ever—do you visit a shopping center?

Sex			Number of visits to a shopping
Female	Male	All	center in a typical month.
7%	8%	7%	Less than once a month
15	16	15	One
15	16	15	Two
8	9	9	Three
18	19	18	Four
13	18	15	Five to seven
11	9	10	Eight to ten
13	5	11	Eleven or more
100%	100%	100%	Total
567	383	945	Number of cases

About one-half of all adults in Wisconsin visit shopping centers more than three times a month, and one out of every ten adults goes there more than ten times each month. Not surprisingly, women go to centers more often

than men, but even about one-third of the men visit shopping centers at least five times a month.*

* * *

Q-6. Do you feel that special interest groups—that is, groups on one side or the other of some public issue—should or should not be allowed to present their views publicly in shopping centers?

Sex			Special Interest Groups:
Female	Male	All	Discuss views
41%	34%	39%	Should be allowed
47	56	51	Should not be allowed
12	9	10	Depends/Don't know
100%	99%	100%	Total
570	384	954	Number of cases

One-half of all adults do not approve the use of the shopping centers by special interest groups (i.e., groups on one side or the other of some public issue). Somewhat over a third (38 percent) support the use of the centers by these groups, and one-tenth of all respondents are undecided as to how they feel on the issue. There is some perhaps unexpected evidence that men are more in opposition than women to the presence of special interest groups in shopping centers.

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* All differences specifically cited in this report between types of respondents are statistically significant.

Q-6b. Do you feel these special interest groups should or should not be allowed to ask for signatures on petitions in shopping centers?

Sex			Special Interest Groups:
Female	Male	All	Ask for signatures
32%	30%	31%	Should be allowed
66	69	67	Should not be allowed
2	1	2	Depends/Don't know
100%	100%	100%	Total
569	385	954	Number of cases

Opposition against permitting special interest groups to ask for signatures on petitions in shopping centers is strong among Wisconsin's citizens; two-thirds of all adults believe these groups should not be allowed to do this. Men and women are in agreement on this point.

* * *

Q-7 to Q-12. If you were in a shopping center and someone from any of the groups I'll name wanted to discuss the group's views with you personally, how would you feel? For example, would it bother you or not if someone from (THE GROUP NAMED BELOW) wanted to talk to you in the center?

	Would (Group) Bother Respondent?				
Group	Yes	No	Depends	Total	Number of Cases
Q-7. the Boy Scouts	25%	72	3	100%	953
Q-8. a charity or church	41%	55	3	99%	947
Q-9. a service group, like the Lions	31%	65	4	100%	952
Q.10. supporters of a candidate for public office	46%	52	2	100%	953
Q.11. an anti or pro-abortion group	55%	42	3	100%	954
Q-12. an anti or pro-nuclear bomb group	52%	45	3	100%	954

As should be expected from the preceding discussion, the extent to which Wisconsin residents object to the presence of private groups in shopping centers varies according to the nature of the group, but even the Boy Scouts receive some opposition. For example, one-quarter of all adults state that they would be "bothered" if a representative of the Boy Scouts wanted to discuss that group's views with them in a shopping center.

The proportion of those who object to this type of contact in centers increases as the groups change from Boy Scouts to service groups, to charities or churches, to supporters of political candidates. Finally, the presence in shopping centers of groups that represent different positions on abortion or the use of nuclear power would "bother" about one-half of all adults in Wisconsin.

Available data indicate that men and women have very similar views about the extent to which these groups

would or would not interfere with their normal shopping patterns.

Q-13. All in all, would the presence of groups like this in some part of a shopping center cause you to avoid that part of the center, or not?

Q-14. Would it cause you to cut down on your shopping time?

Q-15. . . . to find another shopping center?

Sex by: Would the Presence of Groups Like These in a Shopping Center Cause Respondents to . . .

	Avoid that part of the center?			Reduce their shopping time?			Find another shopping center?		
Response	Female	Male	All	Female	Male	All	Female	Male	All
Yes	36%	40%	38%	22%	27%	24%	20%	29%	23%
No	50	43	47	70	65	68	72	63	68
Depends/ Don't know	14	17	15	8	8	8	8	8	9
Total	100%	100%	100%	100%	100%	100%	100%	100%	100%
Number of cases	570	386	956	569	386	955	569	386	955

The presence of objectionable groups in a shopping center would most likely result in a number of shoppers (38 percent) simply avoiding the groups by avoiding that part of the center where the groups are found. Less likely reactions, given by not quite one-quarter of the respondents, would be either a reduction in total shopping time or even going to a different shopping center where, presumably, the groups are absent.

The tendency for men to react somewhat more negatively than women to the presence of special interest groups in centers is seen again in the above findings. Although the differences by sex are not large, a consistently higher percentage of men than women would take some action to avoid contact with these groups.

* * *

Appendix B

Extract from: *Sacramento Union*, Monday, August 8, 1984

Masters of name game get bills on the ballot

By Anne Richards

Sacramento Union Capitol Bureau

"If we are given 150 days, we can qualify anything," said Fred Kimball confidently.

Sobering thought, considering Kimball is the premier entrepreneur of the paid signature gatherers.

You can see his troops in the spring of an election year fanning out in the shopping centers and asking for your signature on the latest initiative.

Kimball is one of a group of highly paid, savvy professionals who make up the initiative industry.

For money — ranging up to a million dollars — this interlocking group of businesses will take an issue, run it through a legal and financial gauntlet, and put in on the ballot for approval by California voters.

Whether the issue is lottery or welfare, marijuana or the Peripheral Canal, the initiative entrepreneurs have mastered the tangle of election law, money manipulation and influence gathering needed to make law — the way the client wants it.

Groups using the initiative to legislate have boosted the number of citizen-initiated measures by 600 percent nationwide in the last 15 years, said David Schmidt, editor of "Initiative News Report," which is based in Washington, D.C.

In California alone in 1984, proponents launched 29 initiatives, of which one gained a spot on the June primary ballot and seven will appear on the November ballot.